SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 589

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, COASTAL TANK LINES, INC., ET AL., APPELLANTS

vs.

MARSHALL TRANSPORT COMPANY, WARREN C. MARSHALL, REFINERS TRANSPORT TERMINAL CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

INDEX

A [Caption omitted.]

1 In the United States District Court for the District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT CO., INC., A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT & TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

Complaint

Filed Sept. 10, 1943

1. This suit is brought under Title 28, U. S. Code, Section 41, subdivision 28 and Sections 43, 44, 45, 46, 47, 47a and 48, and under Title 49, U. S. Code, Sections 17 (9) and 305 (g) (h) (being Section 17 (9) and 205 (g) (h) of the Interstate Commerce Act), to enjoin, set aside, annul and suspend a decision, order, or requirement of the Interstate Commerce Commission entered in September 1943 (copy of which is attached hereto as Exhibit C), in a proceeding pending before said Commission, designated "Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co., Inc., and Warren C. Marshall," Docket No. MC–F–1936, as hereinafter more particularly alleged, and to request this Court to enforce by writ of mandatory injunction the Interstate Commerce Commission's taking jurisdiction of the application filed in said proceeding.

2. Plaintiff Marshall Transport Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Maryland, having its principal place of business at Glen Burnie, Anne Arundel County, Maryland, which is located in that district of the District Court of the United States of
2 America known as the District of Maryland, and is one of the parties upon whose petition the order of the Interstate Commerce Commission hereinafter mentioned was made.

3. Plaintiff Warren C. Marshall is a resident of Upper Darby, Pennsylvania, and is a citizen of the United States of America.

4. The Interstate Commerce Commission under Sections 206–207, Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 306–307) has issued a certificate of public convenience and necessity bearing its No. MC–3003 to plaintiff Marshall

Transport Co., Inc., as successor in interest to the motor carrier operations of plaintiff Warren C. Marshall, under the "grandfather" clause. Said certificate of public convenience and necessity authorizes operations in interstate commerce as a motor-vehicle common carrier of petroleum products, in bulk, in tank trucks, over irregular routes, from Baltimore, Maryland, to points in Delaware, those in Pennsylvania on, south and east of U. S. Highways 422 and 11, those in Accomac County, Virginia, and those in the Washington commercial zone as defined in Washington, D. C., Commercial Zone, 3 M. C. C. 243, returning with no transportation for compensation except as otherwise authorized.

5. Plaintiff Refiners Transport & Terminal Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its office within the State of Delaware at 100 West Tenth Street, Wilmington, Delaware, and with its operating offices at 2111 Woodward Avenue, Detroit, Wayne County, Michigan, and is a common carrier by motor vehicle of petroleum and petroleum products, subject to the Interstate Commerce Act. It holds from the Interstate Commerce Commission a certificate of public convenience and necessity and other operating authority issued under Sections 206–207, Part II of said Interstate Commerce Act (U. S. Code, Title 49, Sections 306–307) bearing Interstate Commerce Commission No. MC–50069 and various subnumbers thereunder. The territory within which such operations are authorized and conducted is located in Michigan, Ohio, Indiana, Illinois, Wisconsin, Missouri,
3 Kentucky, Pennsylvania, and West Virginia.

6. On or about the 8th day of July 1942 the plaintiffs Marshall Transport Co., Inc., and Warren C. Marshall made and entered into a contract with plaintiff Refiners Transport & Terminal Corporation, wherein and whereby they as vendors agreed to sell and Refiners Transport & Terminal Corporation agreed to purchase, subject to the approval of the Interstate Commerce Commission, the above-mentioned operating rights and other carrier properties of Marshall Transport Co., Inc., and Warren C. Marshall. Thereafter an application was filed by plaintiffs with the Interstate Commerce Commission for authority to consummate the sale and purchase pursuant to said contract. Said application was filed on a form "BMC–44", being the form prescribed by an order of the Interstate Commerce Commission dated November 12, 1940, to be used for applications for authority under Section 5, Interstate Commerce Act.

7. Said transaction was proposed and said application for authority to purchase as aforesaid was filed under Sections 5 (2) and 5 (13) of the Interstate Commerce Act (U. S. Code, Title

49, Sections 5 (2) and 5 (13)), which said Section 5 (2) provides in part as follows:

"(a) It shall be lawful, with the approval and authorization of the commission, as provided in subdivision (b) * * * (i) for any carrier to purchase * * * the properties * * * of another * * *.

"(b) Whenever a transaction is proposed under subparagraph (a), * * * the carriers * * * seeking authority therefor shall present an application to the commission * * *."

8. Said Interstate Commerce Commission held a hearing on said application at Baltimore, Maryland, on October 15 and 16, 1942, before one of its authorized Examiners, at which hearing certain other carriers and the Department of Justice appeared in protest to the granting of said application. Subsequently an Examiner's proposed report and order was entered in said proceedings in accordance with the custom and practice of the Interstate Commerce Commission. Said report proposed to grant the authority requested in said application.

4 9. Thereafter exceptions to said proposed report and order were filed by protestants, and in accordance with the practice and procedure of the said Interstate Commerce Commission, briefs were filed and oral arguments were heard by Division 4 of said Interstate Commerce Commission, following which said Division 4 entered an order dated April 5, 1943, granting authority for consummating said purchase. A true copy of said order and the supplemental report accompanying the same is hereto attached as Exhibit A.

10. Subsequently, on petition of protestants, an order was entered granting a reconsideration and rehearing in said proceeding, and the matter was heard on oral argument by the Interstate Commerce Commission on May 28, 1943.

11. On the 12th day of August 1943 there was served upon plaintiffs a report of the Commission on reconsideration, dated August 3, 1943, finding and concluding that said application could not lawfully be approved because it was filed by Refiners Transport & Terminal Corporation instead of being filed by the owner of 82.6% of the total issued and outstanding capital stock of said Refiners Transport & Terminal Corporation, such stock interest being owned by Union Tank Car Company, a New Jersey corporation. Entry of the order dismissing said application was postponed for 20 days in order to afford an opportunity for said stockholder, Union Tank Car Company, to file an application for the desired authority. Union Tank Car Company did not file an application and in September 1943 an order was entered dis-

missing said application, effective October 17, 1943. A copy of said report dated August 3, 1943, is attached hereto as Exhibit B and a copy of said order of dismissal is attached hereto as Exhibit C.

12. The transaction proposed as aforesaid falls directly within the provisions of Section 5 (2) (a) of the Interstate Commerce Act hereinbefore quoted, making it lawful for any carrier to purchase the properties of another carrier upon the approval and authorization by the Interstate Commerce Commission. Said application for authority to consummate such transaction was filed by the "carriers" seeking such authority, as specified by Section 5 (2) (b) quoted as aforesaid. Said Union Tank Car Company is not a necessary party applicant to said proceeding.

13. The filing of such application by Refiners Transport & Terminal Corporation, the corporate motor carrier purchaser, was not only in accordance with said statute above quoted, but also in accordance with a long line of decisions and the settled practice and procedure of the Interstate Commerce Commission in such matters. The application filed as aforesaid was in the form prescribed by the Interstate Commerce Commission by its order of November 12, 1940. The decision and order that the application be dismissed because it was not filed by Union Tank Car Company, a stockholder of one of the applicants, is not consistent with or warranted by any statute, or by any prior decision, rule or practice heretofore followed by said Interstate Commerce Commission.

14. The finding by the Interstate Commerce Commission that Union Tank Car Company should be a party applicant, and dismissing said application because it was not filed by the said stockholder, Union Tank Car Company, is contrary to law.

15. The purchase of said operating rights and properties of Marshall Transport Co., Inc., and Warren C. Marshall by Refiners Transport & Terminal Corporation is within the scope of subparagraph (a) of Section 5 of Part I of said Act and would be consistent with the public interest, and said application should not be dismissed.

16. Plaintiffs filed with said Interstate Commerce Commission an application for temporary authority under Section 210 (b), Part II, of Interstate Commerce Act (U. S. Code, Title 49, Section 310 (b)). On or about August 20, 1942, an order was entered granting such temporary authority for a period not to exceed 180 days and expiring about February 17, 1943. Said Interstate Commerce Commission on February 12, 1943, entered an order

granting authority under Section 5 (2) (a) of the Interstate Commerce Act, for Refiners Transport & Terminal Corporation to carry on said Marshall operations under a lease of said operations and properties for an additional period of 90 days, and thereafter on petition duly filed, on or about May 20, 1943, said Interstate Commerce Commission entered a supplemental order granting authority for a period not exceeding 90 days to carry on said operations under a lease made by the parties dated May 17, 1943. Said lease provided for a term of one year from May 17, 1943, and on August 18, 1943, upon petition duly filed by Refiners Transport & Terminal Corporation said Interstate Commerce Commission entered a second supplemental order authorizing said lease of said operating rights and properties, for a period of 60 days from August 18, 1943.

17. Pursuant to said orders of the Interstate Commerce Commission as aforesaid and said leases, Refiners Transport & Terminal Corporation on or about September 1, 1942, took over said operating rights and properties of Marshall Transport Co., Inc., and Warren C. Marshall, and have been and now are serving the public and carrying on such operations. Among those served in such operations are Army, Navy, Coast Guard, and other governmental agencies engaged directly in the war effort.

18. The authority granted as aforesaid under Section 5 (2) (a) (i) for Refiners Transport & Terminal Corporation to operate under said lease is based in part upon said BMC–44 application which was dismissed by said September 1943 order of the Interstate Commerce Commission, a copy of which is attached hereto as Exhibit C, and if said order dismissing said application is not suspended and the effect thereof restrained, the authority to operate under said lease will cease and terminate, and thereupon Refiners Transport & Terminal Corporation cannot lawfully continue to conduct said operations, and the rights and duty to carry on such operations would revert to Marshall Transport Co., Inc.

However, Warren C. Marshall, president, principal stockholder and executive of Marshall Transport Co., Inc., is a sick man 7 and is unable physically to resume the conduct of said operations in behalf of Marshall Transport Co., Inc., and said corporation has neither the personnel nor the finances necessary to take over and resume said operations.

If Refiners Transport & Terminal Corporation ceases to carry on and conduct said Marshall operations under its said lease as aforesaid, the operations authorized by said certificate would be interrupted and such interruption might be claimed to constitute an abandonment of said operating rights, to the irreparable damage and injury of plaintiffs herein.

If Refiners Transport & Terminal Corporation ceases to conduct said Marshall operations under its said lease as aforesaid, there would be interruption and discontinuance of the service now being rendered to the public thereunder, including that rendered to or for the benefit of the military forces and other governmental agencies, all to the irreparable damage and injury to the public as well as the plaintiffs herein. The continuance of such service is vital to the war effort.

19. Unless a temporary restraining order and a temporary injunction be issued by this Honorable Court enjoining enforcement of said order of the Interstate Commerce Commission dismissing said application, the operations now being conducted by Refiners Transport & Terminal Corporation under its said lease as aforesaid will cease and be terminated, to the irreparable damage and injury of the public, the war effort, and the plaintiffs herein.

20. That unless said decision and order dismissing said application is suspended and set aside, irreparable damage, injury, and inconvenience will be done to the war effort, the public, and plaintiffs.

21. Unless a temporary injunction be issued by this Court suspending said order of dismissal and restraining the operation thereof, there will be no application pending before said Commission upon which said Commission could grant an extension of authority to plaintiffs to operate under said lease.

8 Wherefore, being without an adequate remedy at law and plaintiffs relief being in this Court, and in order to prevent immediate and irreparable loss to plaintiffs, and great and irreparable damage and inconvenience to the public, plaintiffs pray this Court for relief as follows:

A. That process issue against the United States of America as provided by law.

B. That this Court as soon as practicable after the filing of this Complaint call to its assistance for the hearing and determination hereof two other Judges, one of whom shall be a Circuit Judge.

C. That this Court issue a temporary restraining order and temporary injunction staying and suspending and restraining the enforcement and the operation of, and setting aside, the said order of the Interstate Commerce Commission entered in September 1943, a copy of which as Exhibit C is attached hereto, and enjoining any action whatsoever which would prevent or interfere with Refiners Transport & Terminal Corporation continuing operations under its lease with Marshall Transport Co., Inc., and Warren C. Marshall, and from refusing to take any action necessary to enable plaintiffs lawfully to continue to

operate under the said lease, pending the final hearing and determination of this suit.

D. That a temporary restraining order and a temporary injunction be entered herein restraining, enjoining, and suspending until the further order of this Court the operation, execution, effect, and enforcement of said September 1943 order of the Interstate Commerce Commission, a copy of which is attached hereto and made a part hereof as Exhibit C.

E. That upon its final hearing herein this Court adjudge said order of the Interstate Commerce Commission to be null and void and shall enjoin, set aside, annul, and suspend the whole of said order, and issue its writ of mandatory injunction
9 enforcing the Interstate Commerce Commission's taking jurisdiction of said application filed as aforesaid.

F. For such other further or different relief as to the Court may seem proper in the premises.

JOHN T. MONEY,
John T. Money,
Attorney for Marshall Transport Co., Inc., and Warren C. Marshall, plaintiffs herein.
ROBERT W. WILLIAMS,
A member of and in behalf of the firm of Ritchie, Janney, Ober & Williams.
GEORGE H. KLEIN,
George H. Klein,
BIGHAM D. EBLEN,
Bigham D. Eblen,
ROBERT C. WINTER,
Robert C. Winter,
HARRY S. ELKINS,
Harry S. Elkins,
Attorneys for Refiners Transport & Terminal Corporation, plaintiff herein.

John T. Money, 801 Mills Building, Washington, D. C., Attorney for plaintiffs Marshall Transport Co., Inc., and Warren C. Marshall.

Ritchie, Janney, Ober & Williams, Baltimore Trust Building, Baltimore, Maryland; George H. Klein, Bigham D. Eblen, and Robert C. Winter, 2850 Penobscot Building, Detroit, Michigan; Harry S. Elkins, 930 Munsey Building, Washington, D. C., Attorneys for plaintiff Refiners Transport & Terminal Corporation.

11 [*Duly sworn to by Edward S. Turner; jurat omitted in printing.*]

12 *Exhibit A to complaint*

INTERSTATE COMMERCE COMMISSION

No. MC-F-1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSPORT CO., INC., AND WARREN C. MARSHALL

Submitted February 26, 1943.—Decided April 5, 1943

Purchase by Refiners Transport & Terminal Corporation of operating rights and property of Marshall Transport Co., Inc., and certain property of Warren C. Marshall, approved and authorizer, subject to condition. Prior report — M. C. C. —, decided February 12, 1943

Appearances shown in prior report.

SUPPLEMENTAL REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

In the prior report, — M. C. C. —, decided February 12, 1943, and solely as a temporary measure to allow time for oral argument of the issues here involved, we authorized, under section 5 (2) (a), lease[1] by Refiners Transport and Terminal Corporation of the considered properties of Marshall Transport Co., Inc., and Warren C. Marshall for a period expiring May 17, 1943. The case has been orally argued.

Refiners Transport & Terminal Corporation, a Delaware corporation, of Detroit, Mich., and Marshall Transport Co., Inc., of Glen Burnie, Md., herein called Refiners and Transport, respectively, by joint application filed August 3, 1942, seek authority under section 5, Interstate Commerce Act, for purchase by the former of operating rights and property of the latter. As part of the transaction Refiners would also purchase certain equipment and terminal properties of Warren C. Marshall, of Upper Darby, Pa., used by Transport in the conduct of its operations. Hearing

[1] Pursuant to authority granted under section 210a (b) August 20, 1942, Refiners leased the properties of Transport and Marshall, which it here seeks authority to purchase, for a period which expired February 15, 1943, at a rental of $100 per month which is to be applied on the purchase price. Operations were instituted under the lease September 1, 1942. Petition of certain protestant motor carriers for revocation of the temporary authority granted under section 210a (b) was denied by the Commission January 4, 1943. As hereinafter indicated, Refiners took title to, and paid the purchase price for, certain of Marshall's equipment prior to grant of temporary authority under section 210a (b) and such equipment accordingly was not included in the lease.

has been held, at which nine motor carriers [2] opposed the application, but confined their participation to cross-examination of applicants' witnesses. The Antitrust Division, Department of Justice, intervened. Briefs were filed by applicants and the protesting motor carriers, and the latter and the Antitrust Division filed exceptions to the examiner's proposed report and applicants replied.

13 Refiners conducts operations in interstate or foreign commerce pursuant to certificates in Nos. MC–50069 (embracing No. MC–50069 (Sub.-No. 1)),[3] MC–50069 (Sub.-No. 2), MC–50069 (Sub.-No. 4), and MC–50069 (Sub.-No. 7), issued September 23, December 1 and October 6, 1941, and September 16, 1942, respectively, as a motor vehicle common carrier of gasoline and petroleum products, over irregular routes, principally from Toledo, Cincinnati, Cleves, Lima, and Findlay, Ohio, Detroit, Benton Harbor, and St. Joseph, Mich., East St. Louis, Saint Elmo, Hartford, Selmaville, Joliet, Lawrenceville, and Robinson, Ill., Pittsburgh and Midland, Pa., East Chicago and Evansville, Ind., Louisville, Latonia, Ashland, and Catlettsburg, Ky., and Huntington, Parkersburg, Cabin Creek, and Charleston, W. Va., as points of origin, to points in defined areas in Illinois, Indiana, Michigan, Missouri, Ohio, and West Virginia, the authorized destination territory being dependent on the point of origin. Pursuant to orders entered in Nos. MC–50069 (Sub.-No. 9TA). MC–50069 (Sub.-No. 11TA), and MC–50069 (Sub.-No. 12TA), on August 27, June 30, and December 8, 1942, respectively, it was granted temporary authority to transport the same commodities from Terre Haute, Ind., Hooven, Ohio, and Leyden Township, Cook County, Ill., as points of origin. In No. MC–50069 (Sub-No. 13TA), on November 18, 1942, it was granted temporary authority to transport anti-freeze, denatured, and ethyl alcohol, ethyl glycol, and high wines (unfinished grain spirits), over irregular routes, between points in Illinois, Indiana, Kentucky, Ohio, and portions of Pennsylvania, Michigan, Missouri, and Iowa. In No. MC–50069 (Sub-No. 16TA), on November 24, 1942, it was authorized to transport until December 31, 1944, paint thinner, in bulk, in tank trucks, from Milwaukee, Wis., to Hammond, Ind., and Pullman, Ill. It has five other applications pending under section 5,[4] seeking to acquire motor-carrier operations in New

[2] Coastal Tank Lines, Inc., William F. Crossett, Richard F. Kline, Leamon Transportation Company, Clare M. Marshall, M. I. O'Boyle & Sons, a partnership, Petroleum Transport, Shipley Transfer Co., and Vedder Transportation Co.

[3] These rights were acquired from its predecessor, Petroleum Transit Corporation, pursuant to authority granted in Nos. MC–FC 14544 and MC–FC 14544–A on February 24, 1941.

[4] Nos. MC–F–1951, Refiners Transport & Terminal Corporation—Purchase—Leander G. Tait; MC–F–2034, Same—Control—The Collins Transportation Co., Inc.; MC–F–2059, Same—Merger—The Collins Transportation Co., Inc.; MC–F–2100, Same—Purchase—Motor Fuels Transport, Inc.; and MC–F–2128, Same—Purchase—W. T. Holt, Incorporated.

England and in the southeastern portion of the United States. It owns and operates substantially in excess of 20 motor vehicles.

Transport, a Maryland corporation, was organized January 9, 1942, for the purpose of taking over and operating the motor-carrier properties of Marshall. On July 18, 1942, in No. MC–3003, a certificate was issued to Transport,[5] as successor in interest under the "grandfather" clause, authorizing operations in interstate or foreign commerce as a motor-vehicle common carrier of petroleum products, in bulk, in tank trucks, over irregular routes, from Baltimore, Md., to points in Delaware, those in Pennsylvania
14 on south, and east of U. S. Highways 422 and 11, those in Accomac County, Va., and those in the Washington commercial zone as defined in Washington, D. C., Commercial Zone, 3 M. C. C. 243, returning with no transportation for compensation except as otherwise authorized. At about the time of the above transfer to Transport, Marshall also transferred certain physical property consisting of shop and garage equipment, office furniture and equipment, and material and supplies. However, his automotive equipment and a certain parcel of real estate at Glen Burnie, on which there is a terminal, were not transferred, title to the former having been retained by him allegedly because of unexpired licenses. Prior to Refiners' exercise of the above-mentioned temporary authority, such equipment and terminal properties were being used by Transport under a leasing arrangement. Marshall is president of Transport and owns all of its outstanding capital stock except two qualifying shares. Transport began operations as a motor carrier June 1, 1942. Its entire operations are outside the general territory now authorized to be served by Refiners.

TERMS OF CONTRACT AND FINANCING

By agreement dated July 8, 1942, between Refiners, on the one hand, and Transport and Marshall, on the other, Refiners would purchase, free of encumbrance, the above-described operating rights, shop and garage equipment, office furniture and equipment, and material and supplies owned by Transport, and the automotive equipment, including tires, and terminal property owned by Marshall, for a total consideration of $142,000, which is subject to certain adjustments as hereinafter described. The nature of

[5] On April 20, 1942, in No. MC–FC 16277, transfer to Transport from Marshall of rights previously certificated in latter in No. MC–3003, was approved. Additional rights originally granted therein to Marshall, authorizing transportation of petroleum products from four points in New Jersey to points in a defined area in Pennsylvania; and from points in the Philadelphia commercial zone as defined in Philadelphia, Pa., Commercial Zone, 17 M. C. C. 533, and Paulsboro, N. J., to points in defined areas of Pennsylvania, New Jersey, Maryland, and those in Delaware, were acquired by another corporation pursuant to authority granted in Coastal Tank Lines, Inc.—Consolidation, 30 M. C. C. 497.

the physical properties to be transferred and their depreciated book value as of May 31, 1942, are as follows:

10 tractors and 10 trailers (excluding tires)	$31,468
18 tractors and 18 trailers (excluding tires)	39,294
Real estate and terminal at Glen Burnie	20,654
Service car and equipment	201
Tires (most of which are on the above vehicles)	11,582
Shop and garage equipment	395
Office furniture and equipment	608
Material and supplies	705
Total	$104,907

Shortly after execution of the contract, Refiners took title to the 10 tractors and 10 trailers first mentioned, including tires thereon with book value of approximately $5,032, total $36,500, for which it paid $40,000* in cash. As to the remainder of the above purchase price, $102,000, the agreement provides for adjustment in event of approval and consummation by (a) deducting an amount equal to the depreciation on the physical properties, computed from July 1, 1942 to date of taking over of such properties under temporary lease, or otherwise, at rates at which such properties heretofore have been depreciated on Marshall's books; (b) deducting an amount by which the cost of material and supplies shall be less than $1,000 or by adding the amount by which same shall exceed $1,000; (c) deducting an amount equal to the depreciated value of any equipment destroyed, damaged, or rejected by Refiners because of Marshall's failure to keep same in good repair; and (d) deduction of the amount of rental paid under the temporary authority. By a supplemental undated agreement, executed on or about July 16, 1942, and filed at the hearing, Marshall would sell one tractor and one semitrailer not included in the above for $6,000 additional, thus increasing the total purchase price for all of the properties to $148,0000, subject to the adjustments above mentioned.

15 This latter agreement also provides for exclusion from the sale of an underground tank and Sabaco water pump located at the Glen Burnie terminal, and removal and return to the owners of certain meters or calculators now on the equipment. It is further provided that Transport or Marshall, at their own expense, shall accept delivery on 20 new tires now being held for them which will be placed on the equipment to be transferred. Vendors will also accept delivery on 20 additional new tires, for which they have appropriate certificates, provided Refiners furnishes the purchase price thereof. Refiners proposes to finance the purchase through sale of additional capital stock to one or more of its present stockholders, authority for which is sought under section 214, in

*Of this amount $3,330 was paid directly to Marshall and the remainder was paid in satisfaction of equipment mortgages covering all of the vehicles.

No. MC–F–1974, Refiners Transport & Terminal Corporation—Issuance of Stock.

Transport's balance sheet as of August 31, 1942, shows total assets of $25,820, consisting of: Current assets $17,534, principally cash $3,211, and accounts receivable $13,065; carrier-operating property, less depreciation, $3,191; and deferred debits—prepayments $5,095. Liabilities were: Current liabilities $22,900, consisting of accounts payable $18,824, wages payable $1,821, and taxes accrued $2,255; capital stock $10,000; and surplus (debit balance) $7,080, the latter being the deficit from its operations for the period June 1 to August 31, 1942.

Marshall's balance sheet as of May 31, 1942, which includes certain of the above-mentioned physical property subsequently transferred to Transport and Refiners, shows total assets of $140,101, consisting of: Current assets $15,315, principally cash $5,273, accounts receivable $7,937, and material and supplies $705; carrier-operating property, less depreciation, $100,280; nonoperating property $3,450; and deferred debits—prepayments $20,056, and other $1,000. Liabilities were: Current liabilities $29,265, principally accounts payable $25,772; equipment obligations $45,504; and sole proprietorship capital $65,332. His income statements for 1940, 1941, and the first five months of 1942 show net income of $22,890 and $3,320,[1] and deficit of $16,522, respectively.

Refiners' balance sheet as of August 31, 1942, which reflects purchase of a portion of Marshall's equipment and payment of the purchase price, shows total assets of $1,207,198, consisting of: Current assets $334,550, principally cash $83,791, accounts receivable $151,317, and material and supplies $94,115; carrier-operating property, less depreciation, $798,153; intangible property, less reserve for amortization, $14,848; investment securities and advances $14,725; and deferred debits $44,922. Liabilities were: Current liabilities $181,029, consisting of accounts payable $80,952, wages payable $26,793, and taxes and insurance accrued $73,284; capital stock $981,025; and surplus—unearned $27,664, and earned $17,480. Its income statements for 1941 and the first eight months of 1942 show net income of $7,719 and $94,000, respectively, before provision for income taxes, and $6,993 and $32,905, respectively, after provision for income taxes.

REASONABLENESS OF PURCHASE PRICE

No independent appraisal was made of the equipment to determine its value. However, it was spot checked by Refiners and

[1] The 1940 figure reflects results of Marshall's entire operations including those sold in Coastal Tank Lines, Inc.—Consolidation, supra; and the 1941 figure reflects results of his entire operations until date of consummation in that case on April 1, 1941.

found to be in good condition. Nineteen of the 28 tractors were purchased in late 1939, two in February 1940, and seven in late 1940, at a total cost of $71,363. Six of the 28 trailers were purchased in December 1938, eight in January 1939, eight in late 1939, and six in late 1940, at a total cost of $68,141. No information is available on the tractor and semi-trailer covered by the supplemental agreement, but it is represented that they are in good condition. Refiners estimates the present market value of all of the equipment to be substantially in excess of the book value because of present rationing under government regulations and general shortage of tanks and steel for new construction. Marshall has had offers from others for certain units substantially in excess of the average price that is proposed to be paid by Refiners. The latter has been in urgent need of additional equipment to handle its increased business occasioned principally by diversion of rail tank cars to long-haul traffic, necessitating use of available equipment 20 hours per day on the average. The realty in Glen Burnie, on which there is a modern fully-equipped fireproof brick and steel terminal, constructed about two years ago, has a frontage of 300 feet and an average depth of 225 feet. Considering present day conditions and Refiners' urgent needs, we are of the opinion that the price proposed to be paid is not unreasonable. As of August 31, 1942, Refiners proposes to record $2,345 of the total purchase price in its "Other Intangible Property" account and would immediately write off to surplus the amount so recorded. Our findings contemplate accounting for this transaction in accordance with our uniform system of accounts for Class I motor carriers and will be conditioned to require the immediate write-off to surplus of the amount properly assignable by Refiners to its "Other Intangible Property" account resulting from the instant transaction.

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BENEFITS FROM PROPOSED UNIFICATION

Refiners' present traffic consists principally of gasoline, which involves heavy movements during summer months, particularly since the diversion of rail tank cars as above mentioned. Transport's traffic, on the other hand, predominantly has been fuel oil which moves during winter months. As a result, certain of Transport's equipment has been idle during the season when Refiners is most urgently in need of equipment. A unification of the rights under single ownership would result in a more balanced transportation service through transfer of surplus equipment from the east to the west in the summer, and from the west to the east during winter months, thus relieving equipment shortages which have been more acute in the west, and increasing the use factor of all vehicles.

Marshall has been handicapped in conducting an efficient operation because of ill health. His business also has suffered because the normal means of transporting petroleum products to Baltimore by ocean tankers, from which point he distributed such commodities, has been disrupted due to the submarine menace off the coast and diversion of such tankers to other traffic. This has resulted in certain equipment lying idle. The proposed transfer by Refiners of equipment to the west would relieve this situation somewhat and make possible compliance with request of the Office of Defense Transportation that each vehicle be operated 130 hours a week. Refiners' present executive and administrative personnel would conduct the acquired operations. Economies are in prospect through Refiners' greater purchasing power in acquiring insurance, equipment, repairs and other necessary supplies. The shipping public should benefit by reason of Refiners' improved equipment maintenance program and specialized personnel. All employees of Transport, except Marshall and members of his immediate family, would be absorbed in Refiners' organization. Other motor-vehicle common carriers of petroleum products operate throughout the territory served by Marshall. The proposed manner of financing the purchase would not result in increasing Refiners' total fixed charges.

REFINERS' ORGANIZATION

Refiners is the result of consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) in the proceedings shown in footnote 3. It controls, through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 percent of its outstanding common capital stock, par value $10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 percent of such outstanding capital stock is owned by 10 stockholders, the largest block (approximately 22 percent of the total outstanding) being held by the Rockefeller Foundation, New York, N. Y. No stock is owned by a rail or water carrier and only 100 shares thereof are owned by a motor carrier.[8]

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[8] Motor Express, Inc.

It has no stock interest in any other other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment to shippers under standard car service agreements providing for rental payments on a per diem basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latters' tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. It does not manufacture tank-car equipment commercially but does maintain extensive repair facilities throughout the country to service its own equipment. However, while in transit the railroads make minor repairs on the cars at charges provided for in a Master Car Builders Agreement to which Union is a party. Approximately 98 percent of the equipment leased is used by petroleum producers and distributors, but this is changing rapidly due to prevailing war conditions. It has seven officers, who are also its directors, only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock is usually voted under proxies held by its president and two vice presidents.

PROTESTANTS' MOTION AND CONTENTIONS

At close of the hearing and on brief, protestant motor carriers moved to dismiss the application on the grounds that Union is the real party in interest, and that it is necessary that it be an applicant herein before this Commission may authorize the proposed transaction. This same contention is made in their exceptions, those filed by the Antitrust Division, and at the oral argument. They argue, in effect, that for the purpose of the motion it is immaterial whether Union is a carrier, a person affiliated with a carrier, or a person which is not a carrier, for the ultimate result here would be acquisition by Union, now in control of a carrier, of control of "another carrier," not through stock ownership, but under the "otherwise" provision of section 5 (2) (a) [9] of the act. They further argue that failure

[9] Section 5 (2) (a) provides in part as follows:
"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
"* * * for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another: * * * or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise: * * *."

18 to require Union to be made a party applicant would defeat the purpose of section 5 (3),[10] wherein, they state, it is the plain Congressional intent to subject persons who are not carriers, such as holding companies, but who have been authorized under section 5 to acquire control of one or more carriers, to certain of our regulatory powers under the statute, including the provisions of section 214[11] relating to issuance of securities and assumption of obligations of others.

We do not agree with protestants' contention that failure of Union to be made a party applicant herein necessitates dismissal of the application. That Union is not a necessary applicant for control authority herein is in line with our past consistent policy in such cases. Virginia-Carolina Coach Co.—Purchase—Evans, 1 M. C. C. 309, Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo, 5 M. C. C. 479, 36 M. C. C. 325, Cincinnati, N. & C. Ry. Co.—Control—Black Diamond Stages, 15 M. C. C. 644, and Motor Express, Inc.—Purchase—Erie Freight Lines, Inc., 38 M. C. C. 185. The instant transaction involves purchase by a motor carrier of properties of a motor carrier and, as such, falls directly within the permissive clause of section 5 (2) (a) making it lawful "for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another." We are unable to agree with protestants' argument that this transaction falls within the clause of that paragraph making it lawful "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock or otherwise." Much of protestants' argument is based on construing the words "or otherwise," which were added by the Transportation Act of 1940, as including a purchase or other unification effected by a subsidiary motor carrier of such a noncarrier "person." As we view it, the addition of these words was to embrace methods by which control of an additional separate and continuing carrier could lawfully be effected other than through stock ownership among the other authorized transactions. Compare Suddarth—Purchase—Pettyjohn, 37 M. C. C. 185. Union here controls Refiners, the motor-

[10] Section 5 (3) provides in part:
"Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or two or more carriers, such person thereafter shall, *to the extent provided by the Commission in such order*, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, section 204 (a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issuance of securities and assumption of liabilities of carriers), including in each case the penalties applicable in the case of violations of such provisions." [Italic supplied.]

[11] The pertinent portion of section 214 reads:
"Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, *and corporations authorized by order of the Commission to acquire control of any such carrier*, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive of section 20a of part I of this Act * * *." [Italic supplied.]

carrier applicant, and, following the instant purchase, it would continue to be in control of the same single motor carrier. There would be no separate additional carrier under Union's control.

19 In both sections 5 (3) and 214 the word "control" is used. The control therein referred to, like paragraph (2) (a), means through direct or indirect stock ownership, common officers or directors, or some other means whereby the noncarrier person is authorized to acquire control of a carrier (which will thereafter continue as such) in addition to the one already controlled, or of two or more carriers. We conclude, therefore, that the provisions of section 214 would not operate to subject Union to the requirements of section 20a upon our approval of this purchase; and that we are without power, by our order authorizing this purchase, to subject Union to the provisions of the act specified in section 5 (3). In making the foregoing interpretation, however, we are not to be understood as implying that applicant motor carriers in these proceedings are relieved in any way from the necessity of presenting full and complete information as to the person or persons which control their activities, to support the required statutory findings. Protestants' motion is denied.

Protestant motor carriers further contend (1) that Union is a carrier by railroad and (2) that it is affiliated with carriers by railroad and that, accordingly, the application must be denied because no evidence was adduced to sustain the findings required by the proviso of section 5 (2) (b).[12] The Antitrust Division in its exceptions also takes the position that Union is an "affiliate" of railroads. Protestants argue that Union legally is an agency of railroads through whose facilities the latter discharge their common carrier obligations to the public and that Union itself therefore is a carrier; that it makes such cars available to the public indiscriminately[13] to the extent such facilities are

[12] The pertinent portion of section 5 (2) (b) reads:

"*Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Paragraph 6 reads:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason or the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

[13] The instant record shows that Union supplies cars only to those shippers with whom it makes written leases or contracts, and that, on occasion, it takes cars away from such shippers if they are not being utilized to the extent found satisfactory. It does not provide cars to all shippers and may pick and choose those with whom it desires to do business.

available; and that it is only through the medium of railroads that Union can remain in business.

20 The practice of leasing privately-owned cars to shippers and railroads has been one of long standing, and the Commission in a number of cases involving the carrier status of such companies has consistently regarded them as private car companies and not as common carriers. In the Matter of Private Cars, 50 I. C. C. 652, 677, Perishable Freight Investigation, 56 I. C. C. 449, and Guaranty Claim of C., N. Y. & B. Refrigerator Co., 70 I. C. C. 575, 577. In Ellis v. Interstate Commerce Commission, 237 U. S. 434, the Supreme Court found that Armour Car Lines, which owned, manufactured, and maintained refrigeration, tank, and boxcars, and leased them to railroads or shippers, but had no control over the motive power or movement of the cars furnished, could not be regarded as a common carrier by railroad subject to the act. The court there said:

"It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself."

Of similar import is the decision in Chicago Refrigerator Co. v. I. C. C., 265 U. S. 292. In General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422, decided January 2, 1940 (rehearing denied January 29, 1940), involving a corporation described by the court as unaffiliated with any railroad, which owned and leased tank cars to railroads [14] and to shippers for use in interstate commerce, the court said:

"Freight cars are facilities of transportation, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper, and therefore have the exclusive right to furnish them. They are not, however, under any obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a

[14] Here also the railroads' tariff provided for payment to the car owner of an allowance while the cars were in the railroads' possession.

position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission. If the carriers pay too much for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie without the realm of the Commission's competence." [Footnote reference omitted.]

Protestants, however, rely on opinion of the Supreme Court in Union Stockyards & Transit Co. v. United States, 308 U. S. 213, decided December 4, 1939. In that case the court distinguished the situation from Ellis v. Interstate Commerce Commission,
21 supra, and held that a stockyard company acting as an agent and performing no rail-haul itself, but which held itself out to the public as performing loading and unloading services at a railroad terminal for shippers and line-haul railroads, was a common carrier engaged in transportation of property by railroad within the meaning of section 1 (3) (a)[15] of the act. In this connection protestants state:

"In these various cases the essential distinction to be observed in determining whether or not the Union Tank Car Company is, by statutory definition, a common carrier by railroad depends upon whether it is an agent of the railroads providing a means of 'transportation,' whether its facilities are available to the general public on the provided terms, and whether it receives compensation from the shippers. The absence of those circumstances in any of the previously decided cases explains the reason for those decisions. The presence of those circumstances, as here, makes the opposite decision in the Union Stock Yard Transit Case the controlling one."

With such contention we cannot agree. In General American Tank Car Co. v. El Dorado Terminal Co., supra, decided less than

[15] Section 1 (3) (a) provides that the term "railroad" shall include "all the road in use by any common carrier operating a railroad * * * all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property * * *, including all freight depots, yards, or grounds, used or necessary in the transportation or delivering of any such property." It defines the term "transportation" as including "locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, * * * and handling of property transported."

Section 15 (5) provides "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner * * *."

one month after the case next above cited, the tank car company involved was engaged in leasing tank cars to shippers and to railroads in a manner very similar to that followed by Union. As above indicated, such company was found not to be a "carrier or engaged in any public service," and in this respect the conclusion of the court was the same as that heretofore reached by this Commission. In our opinion, there is no basis here for arriving at a different conclusion.

Protestants' further contention that Union and Refiners are affiliated with railroads (no particular railroad is indicated) also is without merit. As above indicated, no shares of stock of Union or Refiners are owned by any railroad, and no officer or director of either has a similar position with any railroad or owns a stock interest therein. Neither Union nor Refiners owns any stock in any other carrier engaged in interstate or foreign commerce. To find that affiliation exists here would be tantamount to saying that any company which manufactures and leases facilities to a railroad is affiliated with such railroad. Union is an independently controlled and managed company engaged primarily in the
22 business of manufacturing and leasing cars to shippers for profit. Its business is its own and not that of any railroad, and it is not managed in the interest of any railroad. Although Union does lease equipment to railroads, the finding is not warranted that such arrangements, or the circumstances under which the leasing occurs, causes Union to be affiliated with a railroad within the meaning of section 5 (6). It follows that the proviso of section 5 (2) (b) is not applicable to the instant transaction. Protestant motor carriers' further contention that Union is affiliated with or dominated by oil companies who use its cars is not supported by the evidence.

Protestants state further that if all else were laid aside the question would remain whether it would be consistent with the public interest to authorize Refiners to consummate the transaction. They argue that Union is one of the principal instrumentalities through which railroads transport petroleum products, and that its and Refiners' present relationship with oil companies would carry with it a reasonably well-assured patronage of various oil interests, and certainly would not negative patronage of Refiners by oil companies which also do business with Union. This, it is argued, would place Refiners in a preferred position detrimental to other independent tank truck operators. The record shows that approximately 15 percent of Refiners' total traffic moves in interstate or foreign commerce, most of its business being received directly from refineries and marine and pipeline terminals and

not from tank cars. It has no arrangements whatsoever for through movements via tank car and truck and performs no functions which Union uses as a supplementary service to its tank car business. It is being managed by the same individuals who managed its affairs prior to Union's purchase of its stock. A representative of Union testified in this connection: "We never intended to have this company [Refiners] operated as an adjunct to the Union Tank Car Company, or the Union Tank Car Company operated as an adjunct to it." It is undoubtedly true, as contended by protestants, that certain advantages would accrue to Refiners as a result of its present association with Union and the latter's business connections. However, admitting this to be true, and particularly considering the manner in which the considered commodities are transported and distributed by tank car and truck, it is reasonable to believe that shippers will continue to use the facilities, to the extent available, of those carriers which provide the most efficient and reliable service. Moreover, Refiners, a new operator in the considered territory, would be faced with competition of numerous well-established petroleum haulers. There is no reason for believing that use of the service of existing carriers, if reasonably as good as that rendered by Refiners, would be discontinued in favor of the latter and merely because of Refiners' relationship to Union. Protestants also argue that this is but the first of a series of acquisitions marking an invasion by Union and Refiners of Atlantic Seaboard territory. We shall consider each case on its merits if and when appropriate applications are filed.

We agree with protestants' last contention that purchase and transfer of title to Refiners of a portion of the equipment involved prior to our approval was unlawful. Such equipment is part and parcel of the instant transaction, which covers all of the motor-carrier properties, and which transaction in its entirety is clearly subject to our jurisdiction under section 5. Whether the transaction is embraced in one or several contracts between the parties is not controlling, as asserted by applicant's counsel, of the question as to whether, together, they cover a single or separate transactions. Wilson Storage & Transfer Co.—Purchase—Dakota Transp., 36 M. C. C. 221, and Spitzer—Purchase—Wicks and Skeie, 37 M. C. C. 191. However, following those cases, denial of the application solely because of such partial unlawful consummation is not warranted, as the transaction otherwise has been shown to be consistent with the public interest.

23 We find that purchase by Refiners Transport & Terminal Corporation of operating rights and property of Marshall

Transport Co., and of certain property of Warren C. Marshall, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of section 5 (2) (a), and will be consistent with the public interest, and that, if the transaction is consummated, Refiners Transport & Terminal Corporation will be entitled to a certificate covering rights granted in No. MC–3003, which rights are herein authorized to be unified with rights otherwise confirmed in Refiners Transport & Terminal Corporation; provided, however, that if the authority herein granted is exercised, Refiners Transport & Terminal Corporation shall immediately write off to surplus the amount of increase in its "Other Intangible Property" account resulting from the instant transaction.

An appropriate order will be entered.

MAHAFFIE, Commissioner, dissenting:

Quite aside from the merit or lack of merit of this application, I disagree with the majority decision that the instant application can properly be approved in the absence of an application by the controlling corporation, Union Tank Car Company.

Approval of this application is based on the clause in section 5 (2) (a) which provides that "It shall be lawful, with the approval and authorization of the Commission as provided in subsection (b) * * * for any carrier * * * to purchase, lease, or contract to operate the properties, or any part thereof, of another."

Reliance upon this clause alone under the facts of the instant case, in my opinion, is to ignore other and more pertinent provisions of section 5. Paragraph (2) (a) also provides that it shall be lawful, with Commission approval, for "a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (b) provides that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission." And it is further provided by section 5 (3) that whenever a person which is not a carrier is authorized under paragraph (2) to acquire control of any carrier, such person thereafter shall, to the extent provided by the Commission in its order, be considered as a carrier subject to certain of the provisions of the Interstate Commerce Act, including certain parts of section 20 (a)

and section 214 and part II. Of particular significance is that part of section 5 (4) which provides that "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever."

The above provisions show unmistakably that Congress intended to prevent noncarriers having control of one carrier from further expanding by purchasing or securing control of additional carriers, whether they be competitors or not, without approval by us. Is the instant transaction such a one? The applicant is controlled through ownership of 82.6 percent of its outstanding common capital stock by Union. Approval of the application unquestionably means that Union can control the operating rights, equipment and franchises of the Marshall Transport Co., Inc.,
24 herein called Marshall, which carrier now operates in a field separate from that of the applicant.[1]

The majority, while stating that the applicant is controlled by Union, and not disputing that Union will or can control the operating rights, equipment, and franchises of Marshall, take the position that such control is not covered by section 5 since Union, following the instant purchase, would continue to control only a single motor carrier, and that "control" as used in section 5 (2), (3), and (4) should be construed to mean control by a noncarrier of at least one more carrier than it already controls, which additional carrier would continue as a separate carrier after the authorization. Such a narrow construction of "control," in my opinion, is contrary to the meaning of that term as used in the statute.

It is true that the Supreme Court in construing the Clayton Act has held that the word "control" as found in that statute does not include the purchase of assets of the company said to be controlled. It is to be noted, however, that whenever Congress has since had occasion to use that word it usually has characterized it in the broadest terms possible. In Rochester Tel. Corp. v. United States, 23 Fed. Supp. 634, affirmed 307 U. S. 125, the court held that the word "control" as used in the Communications Act was to be broadly construed. This construction was adopted by

[1] At this point it also should be noted that the applicant has five other applications pending under section 5, seeking to acquire motor-carrier operations in New England and in the southeastern portion of the United States.

Congress as the definition of control as used in the Interstate Commerce Act.[2] That this was the intent of Congress is shown plainly by the comprehensive language of section 5 itself. Thus, "control" as used in section 5 (2) (a) includes control not only through stock ownership but also by any other means. And, in section 5 (4) it is provided that acquisition of control without Commission approval is unlawful "however such result is attained" and whether achieved through common directors, officers, or stockholders or "in any other manner whatsoever."

Reading into the statute the meaning that control as used therein does not include control unless the identity of the former owner is continued, in my opinion, largely renders nugatory the provisions of section 5 in respect of acquisition of control of motor carriers by noncarriers. In addition to the possibilities of the procedure so successfully followed in this case, it may be noted that many motor carriers consist of individuals, alone or in partnership. Individuals or partnerships so operating often possess extensive rights. Under the majority's construction, control of most, if not all, of such motor carriers might be acquired by noncarriers without regard to the provisions of section 5 because in practically every instance their acquisition would result in loss of identity. Moreover, the character of most of their financial and business structures is simple even when incorporated. Their stock ordinarily is closely held, and they seldom have outstanding securities evidencing long-term debt. Their terminals are usually rented; their equipment if not fully paid for is covered by a purchase money contract; their other assets often consist of a small amount of furniture, some spare tires and parts, together with accounts "receivable" representing outstanding freight bills. Their "liabilities" often consist principally of unpaid equipment balances, bills for tires, parts, and fuel. Under these circumstances it is quite simple to acquire for cash the "assets," including the certificate and good will, and to assume or pay the "liabilities," and to liquidate the concern. Proceeding thus through a controlled subsidiary, as the majority here approve, a noncarrier holding company, or others, may expand at will without becoming subject to our jurisdiction. This, in my opinion, is contrary to the intention of Congress, as plainly stated in the statute.

The majority report is said to be "in line with our past consistent policy in such cases." I have no reason to think this statement incorrect. But I do not consider that fact an adequate basis for a decision. If our policy as expressed in the reports cited has

[2] Conference report on S. 2009, August 7, 1940, H. R. No. 2832, 76th Cong., 3rd Sess., page 63.

been wrong as a matter of law it is our obligation to correct rather than to perpetuate the error.

In determining an application under section 5, consideration should be given to the true nature of the undertaking in the light of all of the applicable provisions of section 5. As said in Overfield v. Pennwood Corp., 42 Fed. Supp. 586, 608:

"* * * when a subsidiary corporation does something for the benefit of the parent corporation which has the power to control, it may be inferred that the parent corporation caused the act to be done."

Considered thus, I am satisfied that the instant transaction should not be approved without an application for authorization by Union.

26 ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 5th day of April, A. D. 1943

No. MC–F–1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSPORT CO., INC., AND WARREN C. MARSHALL

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That purchase by Refiners Transport & Terminal Corporation, of Detroit, Mich., of operating rights and property of Marshall Transport Co., Inc., of Glen Burnie, Md., and certain property of Warren C. Marshall, of Upper Darby, Pa., be, and it is hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) notify this Commission in writing of the intended consummation date, (2) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (3) confirm, in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, unless the authority herein granted is exercised on or before May 17, 1943, this order shall be of no further force and effect.

It is further ordered, That effective with exercise of the authority herein granted, the order entered herein February 12, 1943, shall be of no further force and effect.

It is further ordered, That recital in said report of balance-sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

It is further ordered, That, before recording the purchase upon its books, Refiners Transport & Terminal Corporation shall submit the related journal entries, in triplicate, to our Bureau of Motor Carriers for approval.

And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act, except section 5 thereof, as expressly determined herein.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

28 *Exhibit B to complaint*

INTERSTATE COMMERCE COMMISSION

No. MC–F–1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSPORT CO., INC., AND WARREN C. MARSHALL

Submitted June 7, 1943.—Decided August 3, 1943

On reconsideration found that application of Refiners Transport & Terminal Corporation and Marshall Transport Company, Inc., for purchase by the former of operating rights and property of the latter should be dismissed. Entry of order deferred. Findings in supplemental report herein, 39 M. C. C. 93 (decided April 5, 1943), modified.

Additional appearances: *Tom C. Clark* and *James E. Kilday* for the Antitrust Division, Department of Justice.

Martin Sack for additional protestants.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior supplemental report, 39 M. C. C. 93, decided April 5, 1943, division 4 conditionally authorized, under section 5 (2) (a), the purchase by Refiners Transport and Terminal Corporation, herein called Refiners, of operating rights and property of Marshall Transport Co., herein called Transport, and certain property of Warren C. Marshall.

Motor-carrier protestants and the Antitrust Division, Department of Justice, intervener, herein collectively called protestants, by petitions filed April 15 and April 22, 1943, to which applicants replied, requested reconsideration and further oral argument.[1] By order of May 11, 1943, we reopened the proceeding for reconsideration and further oral argument has been heard. By order entered May 20, 1943, Petroleum Carrier Corporation and Walker Hauling Company, motor-carrier protestants, were permitted to intervene and were represented by counsel at the further oral argument.

29 The purchase authorized in the prior supplemental report was not consummated, and, by supplemental order of May 20, 1943, division 4 authorized Refiners to continue leasing the properties of Transport under section 5 (2) (a) for a further period expiring August 18, 1943, at a rental of $1,700 per month to be applied on the purchase price, which lease is now in effect.

The facts involved are adequately set forth in the prior supplemental report and will be repeated here only to the extent necessary for clarity of understanding. The following facts, which are not in dispute, are quoted from that report:

"Refiners is the result of a consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and instrastate commerce as more particularly described in Refiners Transport & Term. Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) * * *. It controls, through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 percent of its outstanding common capital stock, par value $10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 percent of such outstanding capital stock is owned by 10 stockholders, the largest block (approximately 22 percent of the total outstanding) being held by the Rockefeller Foundation, New York, N. Y. No stock is owned by a rail or water carrier and only 100 shares thereof are owned by a motor carrier [footnote omitted]. It has no stock interest in any other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment to shippers under standard car service agreements providing for rental payments on a per diem

[1] Oral argument was heard by the division prior to its decision.

basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latters' tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. * * * It has seven officers, who are also its directors, only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock, is usually voted under proxies held by its president and two vice presidents."

At the close of the hearing and on brief, protestants moved to dismiss the application on the grounds that Union is the real party in interest, and that it is necessary that it be an applicant herein before we may authorize the proposed transaction. This same contention was made in their exceptions to the examiner's proposed report, those filed by the Antitrust Division, and at the oral argument, and is now repeated in their petitions for reconsideration. Protestants further contend (1) that the conclusions in the prior report that Refiners and Union are not affiliated with a railroad within the meaning of section 5 (6) is in error because (a) the report fails to make adequate findings of fact to support that conclusion and (b) it is too narrow a view of the meaning of "affiliated" under that paragraph, as a matter of law; (2) that the division erred in finding that each application filed by Refiners to acquire motor carriers may properly be determined, without considering all similar transactions proposed in pending applications of that applicant at the same time; (3) that approval of the transaction in spite of the finding that a portion thereof had already been unlawfully consummated is in error, because no power is conferred by section 5 to approve other than proposed transactions; and (4) that approval of this transaction would result in undue restraint of competition because of the control of Union and the latter's close working arrangement with railroads in the transportation of petroleum by tank car.

In support of their first contention, the protestants argued, in effect, that it was immaterial whether Union was a carrier, a person affiliated with a carrier, or a person which was not a carrier, for the ultimate result would be acquisition by Union, now in control of a carrier, of control of another carrier.[2] In considering this contention of the protestants, the division, while finding that the applicant is controlled by Union, and not disputing that Union will or can control the operating rights, equipment, and franchise of Marshall, held that the failure of Union

to be made a party applicant did not necessitate dismissal of the application because the proposed transaction is expressly authorized by the permissive clause of section 5 (2) (a) making it lawful "for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another." The division further held that this transaction does not fall within the clause of that paragraph making it lawful "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock *or otherwise*." [Italics supplied.] The words "or otherwise," which were added by the Transportation Act, 1940, are construed by the division only to embrace methods by which control of an additional separate and continuing carrier would be lawfully effected other than through stock ownership among the other authorized transactions. In other words, the division held that since Union, following the instant purchase, would continue to control only a single motor carrier—Refiners—the instant transaction may be authorized because "control" as used in the statute means control of at least one more carrier than it already controls, which additional carrier would continue as a separate carrier after
32 the authorization. The division also extended that construction of "control" to both sections 5 (3)[3] and 214[4] of the Act.

This interpretation apparently is based on the decision of the Supreme Court in Federal Trade Commission v. Western Mich. Company, 272 U. S. 555, wherein the court in construing the Clayton Act held that the word "control" as found in that statute does not include the purchase of assets of the company said to be controlled. It is to be noted, however, that whenever Congress has since had occasion to use the word "control" it usually has characterized it in the broadest terms possible. The word "control" as such has no precise legal or technical meaning. Thus, in Gulf Refining Co. v. Fox, 11 F. Supp. 425, 430, it is said:

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[1] Section 5 (2) (a) provides in part as follows:
It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
"* * * for any carrier, or two or more carriers jointly to purchase, lease or contract to operate the properties, or any part thereof, of another. * * * or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *."

[3] Section 5 (3) provides in part as follows:
"Whenever a person which is not a carrier is authorized, * * * to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to * * * section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, * * *, and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, * * *."

[4] The pertinent portion of section 214 reads:
"Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20r of part I of this Act * * *."

"* * * the word 'control' has no legal or technical meaning, and must be given such an interpretation as the Legislature intended it to have, to be ascertained from the connection in which it is used, the act in which it is found, and the legislation of which it forms a part."

That "control" should be broadly construed in connection with proceedings under the Interstate Commerce Act is not open to question. In Rochester Tel. Corp. v. United States 23 Fed. Supp. 634 affirmed in 307 U. S. 125 the court held that the word "control" was to be broadly construed. This construction was adopted by Congress as the definition of control as used in the Interstate Commerce Act,[5] and the wording of section 5 plainly shows that it was the intent of Congress that noncarriers having control of one carrier should be prevented from further expanding by securing control of additional carriers, whether they be competitors or not, without approval by us. Section 5 (2) (a) provides that not only must such a noncarrier obtain our approval before it secures control of an additional carrier through ownership of its stock, but also by any other means. Section 5 (4)[6] further provides that acquisition of control without our approval is unlawful "however such result is attained," and whether achieved "directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust, or in any other manner whatsoever."

There can be no more direct or positive manner of obtaining control than by outright purchase. It is inconceivable that the outright purchase of another company's franchise and properties through the medium of the already owned subsidiary would have been exempted while the mere purchase of stock control of the other company through the same subsidiary would activate the statute. As a matter of fact, acquisition of control of many motor carriers could be obtained only by purchase of the properties because many motor carriers are owned by individuals alone or by partnerships. Such individuals and partnerships often possess extensive operating rights. It further is to be noted that the financial and business structures of many motor carriers are quite simple even when incorporated. Their stock usually is closely held, and they rarely have securities out-

[5] Conference report on S. 2009, August 7, 1940, H. R. No. 2832, 76th Cong., 3rd Sess., page 63.

[6] Section 5 (4) provides in part as follows:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. * * * As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

standing evidencing long-term debt. Their terminals in many instances are rented; their equipment if not fully paid for is covered by some form of a purchase money contract; their other assets often consist of a relatively small amount of furniture, some spare tires and parts, together with accounts "receivable" representing outstanding freight bills, etc. Their "liabilities" often consist principally of unpaid equipment balances, bills for tires, parts, and fuel, etc. It often is quite simple under these circumstances to acquire for cash the "assets," including certificate and good will, and to assume or pay the "liabilities," and to liquidate the concern. Proceeding thus through a controlled subsidiary, a non-carrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of "control" as used in the Act.

It is suggested that it is discretionary with us as to whether we should entertain the instant application in the absence of an application from Union, and reference is made to the provisions of section 5 (3) in support of the suggestion. It is true that the provisions of section 5 (3) leave to our discretion the extent to which noncarriers should be subjected to certain provisions
35 of the Interstate Commerce Act. Section 5 (2) (b) provides, however, that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission." The record shows that the proposed transaction is unquestionably one by a person having control of a carrier seeking to secure control of another carrier and, in our opinion, is exactly of the kind that the statute is intended to cover. We are confirmed in this opinion by the fact that applicant now has pending before us five other applications under section 5 seeking to acquire motor-carrier operations in New England and in the southeastern portion of the United States.

It is stated in the prior report that the entertaining of the instant application is "in line with our past consistent policy in such cases." That statement is not entirely correct. See Warrior & Gulf Nav. Co., Control, 250 I. C. C. 26, Cuyahoga Valley Ry. Co. Control, 252 I. C. C. 683, and Willamette River Towing Company Purchase, — I. C. C. — (decided July 14, 1943). If we have approved applications in the past where the factual situation as to the point here involved corresponded to that which is presented herein, that would afford no basis for us to administer the statute contrary to its provisions. Our authority extends only to the administration of the statute enacted by Congress, and does not extend to the determination of a "policy"

not expressed in the statute itself (United States v. Illinois Central R. Co., 263 U. S. 515; Southern Pac. R. Co. v. Interstate Commerce Commission, 219 U. S. 433; Interstate Commerce Commission v. Union Pac. R. Co., 222 U. S. 554).

We find and conclude that the instant application may not lawfully be approved in the absence of an appropriate application by the real party in interest, the controlling
36 corporation, Union. The application should be dismissed.

Entry of an order dismissing the application will be deferred for a period of 20 days from the date of service of this report in order to afford an opportunity for Union to file an appropriate application. In view of this conclusion, further discussion of other contentions now of record is unnecessary.

SPLAWN, Commissioner, concurring:

In this proceeding, a subsidiary of the Union Tank Car Company seeks to purchase a petroleum motor carrier operating in the eastern states. It also has pending before us several other similar applications. Union owns many railroad tank cars which are leased to the railroads and to shippers for the transportation of petroleum products. The compensation for the rental of these tank cars is derived primarily from mileage allowances paid by the railroads directly to it as the owner of the cars.

The record does not disclose the plan or purpose of Union in acquiring control of these several petroleum motor carriers. It is urged by applicant that Union is not a carrier and is not a necessary party to this proceeding. Whether or not this contention is sound, it is clear that Union has close railroad connections and has a very definite interest in the transportation of petroleum by railroad. The burden is on applicant to establish that the proposed transaction is consistent with the public interest. The meager facts of record lend color to the contention of protestants that the proposed transaction is the beginning of an effort to obtain monopolistic control of the transportation of petroleum both by railroad and by motor carrier, contrary to the public interest. In my opinion, applicant has not sustained the burden of showing on this record that the proposed transaction would be consistent with the public interest, and therefore, the application should be denied.

PORTER, Commissioner, dissenting:

Dismissal of this application is proposed by the majority on the ground that it "may not lawfully be approved." This is merely another way of saying that we are without the power to approve this application on the merits because the transaction is not one "within the scope of subparagraph (a)" of section

5 (2). It is found to be not within the scope of that subparagraph because the majority stockholder of Refiners did not sign the application form. But the statute does not require such signature nor do our rules. The application form prescribed by order of division 5 January 10, 1936, for use in purchases such as this one arising under former section 213 contained no requirement and made no provision for any stockholder of the purchaser to join in the application. Similiar form prescribed by order of division 4 November 12, 1940, for seeking purchase authority under section 5 (2) (a), which was the form of application filed in this case, likewise omits any provision or requirement for signature or joinder therein by stockholders of purchaser. Thus for more
37 than seven years we have decided hundreds of applications like the instant one without the majority stockholder of purchaser being a party applicant; but suddenly the majority penalize this particular purchaser for following the procedure which we ourselves long since established. (Virginia-Carolina Coach Co.—Purchase—Evans, 1 M. C. C. 309, Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo., 5 M. C. C. 479, 36 M. C. C. 325, Cincinnati, N. & C. Ry. Co.—Control—Black Diamond Stages, 15 M. C. C. 644, and Motor Express, Inc.—Purchase—Erie Freight Lines, Inc., 38 M. C. C. 185). In the second case above cited, on reconsideration, the Commission approved the application without requiring the signature on the application of that purchaser's sole stockholder, U. S. Truck Lines, Inc., or the latter's majority stockholder, Standard Carloading Corporation, or that company's three stockholders, Erie Land and Improvement Company, Lake Erie Coal Company, Limited and Virginia Transportation Company, or the stockholders of each of those three companies, Erie Railroad Company, Pere Marquette Railway Company, and the Chesapeake and Ohio Railway Company, respectively, or one or more of the stockholders of the last named company, which held stock control of the preceding two companies. Yet, in approving the purchase there proposed, full cognizance was taken of all links in that chain. Insistence upon the signature of the controlling stockholder of a purchasing carrier is not only administratively impractical but wholly unnecessary to determine the issues presented by the proposal to purchase under section 5.

Is this purchase a transaction within the scope of subparagraph (a)? In my opinion it falls directly within the wording of the clause—"for any carrier * * * to purchase * * * the properties * * * of another." The instant purchaser, Refiners, is unquestionably a carrier seeking to purchase the properties of another carrier. In determining that it is not within the scope of subparagraph (a), the majority confuse their con-

sideration of that question with the all-inclusive declaration of illegality contained in section 5 (4), where transactions, whether within or without the scope of subparagraph (a), are made unlawful if effected without our approval. Unquestionably, if the instant purchase transaction were effected without our approval, it would have been effected in violation of section 5 (4) and both Union and Refiners would have participated in that violation. But the question here in issue does not arise under section 5 (4) as this is not a proceeding under section 5 (7). This question arises under section 5 (2) (a), the purpose of which is primarily jurisdictional. If it is not, there would have been no purpose in the Congress requiring that we must find, if we approve the proposed transaction, that it is within the scope of that subparagraph.

The majority emphasize the words "or otherwise," which were added by the Transportation Act of 1940, as supporting their conclusion that the control by Union of the considered properties of Transport and Marshall, which would result from their unification with those of Refiners, is itself a transaction within the scope of subparagraph (a), and must therefore be specifically applied for by Union and authorized specifically by our order.

The history of section 5 as amended June 16, 1933, and of former section 213, which was modeled after section 5, is discussed at some length in Cleveland, Columbus & Cin. Highway, Inc.—Purchase—*Reo*, supra. That it was the Congressional intent in enacting former sections 5 (4) and 213 (a) to set forth in those paragraphs those transactions which it intended that we should have the power to approve is apparent from that discussion. Those statutory limitations upon what constitute permissive transactions were preserved in section 5 (2) (a). The addition of the words "or otherwise", only to those clauses of that subparagraph which relate to the bringing of an additional carrier under common control with another carrier, in no way affects our power to approve a purchase transaction. The latter transaction falls directly within the literal wording of the clause relating to purchase of properties of one carrier by another. Under ordinary rules of statutory construction it is clear that the addition of "or otherwise" to the acquisition-of-control clauses in subparagraph (a), and not to all clauses, was intended only to enlarge the acquisition-of-control class of transactions, and without changing the fundamental nature of those transactions, which is, that the carrier of which control would be acquired, either through stock ownership or by other means, retains a separate carrier existence. Such is not the situation in the instant case where only one carrier would emerge from the instant purchase.

38

This record contains sufficient evidence concerning the stockholders of the purchasing carrier to warrant determination of the proposed transaction on its merits, including the matter of whether such transaction would be consistent with the public interest while the stock and ultimate control is held by Union. That the proposed purchase is a transaction within the scope of subparagraph (a), which we may approve or deny on the basis of the present application and record, is, in my opinion, clear.

I am authorized to state that Commissioner Miller concurs in this expression.

By the Commission.

W. P. BARTEL, *Secretary.*

39 *Exhibit C to complaint*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of September, A. D. 1943

No. MC–F–1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSIT CO., INC., AND WARREN C. MARSHALL

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on August 3, 1943, having made and filed a report containing its findings of fact and conclusions thereon, with entry of order deferred for 20 days from date of service of said report for the reason therein stated, which report is made a part hereof;

It is ordered, that the application be, and it is hereby, dismissed, effective October 17, 1943.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

52 In the United States District Court for the District of Maryland

[Title omitted.]

Answer of the United States of America

Filed Sept. 16, 1943

Now comes the United States of America, defendant herein, and in answer to the complaint says:

1. Admits the allegations of paragraphs 1 through 10 of the complaint.

2. Admits the allegations of paragraph 11 of the complaint and for further answer alleges that the Commission made the following ultimate finding and conclusion in its report of August 3, 1943:

"We find and conclude that the instant application may not lawfully be approved in the absence of an appropriate application by the real party interest, the controlling corporation, Union. The application should be dismissed."

3. Admits the allegations of paragraph 12 except that it denies that Union Tank Car Company was not a necessary party applicant in said proceedings. For further answer alleges that the Commission concluded that this same transaction would also result in the acquisition and control of another carrier by a person which was not a carrier and which already had control of one carrier (namely, Union Tank Car Company, the parent corporation of plaintiff Refiners Transport & Terminal Corporation), and that under section 5 (2)(a) and (b) of the Interstate Commerce Act such a transaction could not be lawfully carried
53 out without an application to the Commission for authority to carry it out by such person. For further answer alleges that such conclusion by the Commission was in all respects valid and justified.

4. Admits that the present decision of the Commission may be inconsistent with some of its former decisions, as alleged in paragraph 13 but alleges that this is of no legal significance and does not disturb the validity of the Commission's present determination.

5. Denies the allegations of paragraph 14.

6. Admits that this transaction is within the scope of section 5 (2)(a) of the Interstate Commerce Act but denies that such transaction would be consistent with the public interest in the absence of a finding to that effect by the interstate Commerce Commission. For further answer alleges that the Commission did not consider the question of public interest here because it held that an application for permission to carry out this same transaction should also have been filed under section 5 (2) (b) by Union Tank Car Company for the reasons above indicated. Denies that under these circumstances the application of plaintiff Refiners Transport & Terminal Corporation should not have been dismissed.

7. Admits the allegations of paragraph 16.

8. Admits the allegations of paragraph 17 except that it alleges that it has no knowledge as to what customers Refiners Transport & Terminal Corporation serves.

9. Admits the allegations of the first paragraph of paragraph numbered 18. As to the remaining allegations of that paragraph

it alleges that it has no knowledge as to the truth thereof, but it denies that plaintiff will suffer any unlawful or irreparable injury if this order is not set aside. For further answer alleges that plaintiff Refiners Transport & Terminal Corporation could have avoided being placed in its present position by having its corporate parent corporation, Union Tank Car Company,
54 file an application under section 5(2)(b) with the Commission within the twenty-day period authorized by the Commission's decision of August 3, 1943.

10. In answer to paragraphs 19 and 20 alleges that although it does not deny plaintiffs' standing to bring this suit, it denies that plaintiff has made the required showing of irreparable injury for the issuance of a temporary restraining order or interlocutory injunction. For further answer alleges that if this case is heard on the merits on September 20, it can, no doubt, be decided before October 17, 1943, the present effective date of the Commission's order. In any event it is the Commission's usual practice on request of a court to extend the effective date of an order pending the decision of a court in a suit attacking the order, making the issuance of a temporary restraining order or an interlocutory injunction unnecessary.

11. Admits the allegations of paragraph 21 but alleges that nothing in the Commission's order prevents Union from now filing an application for approval of this transaction.

Wherefore, it is respectfully prayed that the complaint should be dismissed.

ROBERT L. PIERCE,
Robert L. Pierce,
Special Assistant to the Attorney General,
Washington, D. C.
Counsel for the United States.

WENDELL BERGE,
Assistant Attorney General.
BERNARD J. FLYNN,
United States Attorney.

55 CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above answer together with a copy of memorandum brief of the United States upon each of the following by mailing them a copy thereof this 15th day of September, 1943: John T. Money, 801 Mills Building, Washington, D. C.; Ritchie, Janney, Ober & Williams, Baltimore Trust Building, Baltimore, Maryland; George H. Klein, Bigham D. Eblen and Robert C. Winter, 2850 Penobscot Building, Detroit, Michigan; Harry S. Elkins, 930 Munsey Building, Washington,

D. C.; Daniel Kunkel, Esq., Interstate Commerce Commission, Washington 25, D. C.

ROBERT L. PIERCE.
Robert L. Pierce.

56 In the District Court of the United States for the District of Maryland

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed Sept. 20, 1943

Now comes the Interstate Commerce Commission, by its counsel, pursuant to authority granted it under the Judicial Code of the United States, 28 U. S. C. 45a, and files its intervention in the above-entitled proceeding.

DANIEL H. KUNKEL, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

57 In the District Court of the United States for the District of Maryland

[Title omitted.]

Answer of Interstate Commerce Commission, intervening defendant

(Filed Sept. 20, 1943

Now comes the Interstate Commerce Commission, intervening defendant, by its counsel, and in answer to the complaint respectfully represents:

1. The averments of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 are admitted.

2. In answer to paragraph 12 of the complaint, it is admitted that the transaction therein referred to falls within the provisions of section 5 (2) (a) of the Interstate Commerce Act, but denies that Union Tank Car Company is not a necessary party applicant to said proceeding.

3. In answer to paragraph 13 of the complaint, it is denied that the settled practice and procedure of the Commission has any bearing upon the issue here involved and further denies that the decision and order of the Commission dismissing plaintiffs' application is not consistent with or warranted by statute.

4. The averment of paragraph 14 of the complaint is denied.

5. Paragraph 15 of the complaint, insofar as it alleges that the application should not be dismissed, is denied. In
58 further answer, it is averred that the question of public interest was not passed upon by the Commission and is not a competent issue before this court.

6. The averments of paragraphs 16 and 17 of the complaint are admitted.

7. In answer to paragraphs 18, 19, 20, and 21, the Commission being without knowledge as to the facts therein alleged neither denies nor admits the same, but denies that the plaintiffs would suffer irreparable injury if the order in issue is not set aside.

8. In further answer to the averments of said complaint the Commission avers that the findings and conclusions contained in said reports and order attached hereto and marked Exhibits A, B, and C, respectively, were and are and each of them was and is fully supported and justified by the evidence submitted in the proceeding before the Commission, and that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including the plaintiffs herein; that said reports and order were not made or entered either arbitrarily or unjustly or without proof or contrary to the relevant evidence, or without evidence to support them; that in making said reports and order the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the averments to the contrary contained in the complaint.

Except as herein expressly admitted the Commission denies the truth of each of and all the averments contained in the complaint insofar as they conflict either with the averments herein or with the findings and conclusions contained in said reports and orders.

All of which matters and things the Commission is
59 ready to aver, maintain, and prove.

Wherefore, the Commission prays that the complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL H. KUNKEL, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel,
For Interstate Commerce Commission.

60 In United States District Court

[Title omitted.]

Petition of Coastal Tank Lines, Inc., et al, for leave to intervene, and order of allowance

Filed 20th September 1943

Come now Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, and respectfully show unto the Court as follows:

I

The above-named companies and persons, respectively, intervenors herein, were each parties to the proceedings before the Interstate Commerce Commission involved in the above entitled action, being protestants against the applications of Refiners Transport and Terminal Corporation both in respect to the application of that company for authority to purchase the physical properties, good will and operating rights of Marshall Transport Company, Inc., and Warren C. Marshall, and in respect to the application for authority to operate the properties of the vendors pending hearing and disposition of the main application.

II

As in such cases provided by statute such protestants before the Interstate Commerce Commission now respectfully intervene in this action before the United States District Court for the District of Maryland and further show unto the Court as follows:

61 III

The order of the Interstate Commerce Commission which the plaintiffs in this action assail dismissed, effective as of October 17, 1943, the application of the plaintiff herein for approval of the purchase of the properties, good will and operating rights involved. That dismissal was upon the ground that the Commission lacked authority to entertain the application unless such an application were to be made by or concurred in by Union Tank Car Company.

It was shown in the evidence before the Commission and was found by it that Union Tank Car Company is one of the larger

owners and operators of railroad tank cars in the United States for the transportation of petroleum. It was further shown in the evidence before the Commission and found by it that Union Tank Car Company concluded sometime ago that in addition to its business of owning and operating railroad tank cars it would also undertake to engage in the business of transporting petroleum by means of tank trucks to be operated upon the highways. To that end it first purchased three tank truck companies operating from refinery locations in Ohio, Michigan, Indiana, and adjoining border points. Those purchases were accomplished by means of the creation by Union Tank Car Company of a corporation having the name Refiners Transport & Terminal Corporation, the capital for which was supplied by Union Tank Car Company which also took most of the capital stock, and out of such capital Refiners Transport & Terminal Corporation acquired the three trucking companies referred to. The small balance of the capital stock was taken by certain of the former owners of these trucking companies, who were retained as operating executives of the trucking enterprise. Thereafter from time to time Union Tank Car Company supplied additional capital to Refiners Transport & Terminal Corporation, receiving additional stock therefor, and out of such further capital additions and improvements to the trucking properties then owned were made. Having in that way inaugurated a large program of tank truck company acquisitions
62 in the middle-west additional agreements thereafter were entered with the owners of other tank trucking companies serving substantially all the refinery locations along the Atlantic seaboard (four additional companies in number), including the Marshall interests involved in this proceeding. The purchase agreements so entered were put in the name of Refiners Transport & Terminal Corporation, the required added capital for the purpose of these further acquisitions to be supplied by Union Tank Car Company. In view of the foregoing facts and considerations it was properly concluded by the Commission that Union Tank Car Company is the real party in interest in this proceeding. It was further concluded by the Commission that whether or not Union Tank Car Company may itself be a common carrier by railroad within the legislative definition of the Interstate Commerce Act or whether it be a noncarrier it is, with respect to the attempted acquisition of the Marshall tank trucking interests, the real and true party in interest. As a consequence the Commission properly concluded that the Commission is without authority to proceed with a consideration of these applications on their merits, if any, unless Union Tank Car Company, as the real party

in interest, shall be an applicant before the Commission for approval authority to acquire under the statute, control of two or more motor carriers, whether such control be direct or indirect or by any manner or means whatsoever, including either the purchase of stock or the purchase of physical assets, good will and franchise operating rights. It was furthermore concluded by the Commission that should Union Tank Car Company become such an applicant and should it receive from the Commission, authority to acquire two or more motor carriers then that the securities issues of Union Tank Car Company would, under the statute, be subject to the jurisdiction of the Interstate Commerce Commission and cease to be subject to the jurisdiction of the Securities Exchange Commission, all in accordance with law, and that such result
63 may not be circumvented through the scheme of having approval applications made only in the name of Refiners Transport & Terminal Corporation which was organized by and is a completely dominated carrier subsidiary of Union Tank Car Company. Intervenors show unto the Court that such order of the Commission dismissing the application was therefore in accordance with the requirements of law and within the authority of the Commission.

IV

This action is now before the Court for hearing in Baltimore September 20, 1943, upon application of the plaintiffs for a temporary stay and for an interlocutory injunction directing the Interstate Commerce Commission not to make effective its order of dismissal of the said application as of October 17, 1943, pending final consideration of this cause by this Court. It is respectfully shown unto the Court that the plaintiffs would not suffer any legal injury should such application for temporary stay and for interlocutory injunction be denied. Therefore, both should be denied. Intervenors show:

V

Under the provisions of Section 210 (b) of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 310b) the Interstate Commerce Commission was not authorized by the statute to grant for a period of more than one hundred and eighty days the right of Refiners Transport & Terminal Corporation temporarily to lease and operate the properties of Marshall Transport Company, Inc., and Warren C. Marshall pending its consideration and decision of the purchase application herein involved. The first order of Division 4 of the Commission, issued August 20, 1942, approving a temporary lease, was of that nature in terms and

expired at the end of one hundred and eighty days. The operations thereafter and now being conducted only by temporary lease were approved only by two of the three members of Division 4 of the Commission. The present purported temporary lease authority therein provided also expires October 17,
64 1943. Such action of a majority of the membership of Division 4 of the Commission was and remains wholly without legal authority in the statute and is null and void. The recital in such purported unexpired order of the majority of Division 4 that it was made and entered under the provisions of Section 5 of the Interstate Commerce Act (not subject to the 180-day limitation or depending on the main purchase application) is negatived by the other terms and provisions thereof and by the true nature of the applications for temporary lease authority upon which those two Commission members acted. As appears therein the parties thereto only sought and those two commissioners only purported to grant temporary lease privileges pending the final consideration of the main purchase application. As the authority to grant such temporary lease authority for that purpose and under such conditions existed for only one hundred and eighty days which long since expired the attempted denomination of the subsequent purported orders granting temporary lease authority beyond one hundred and eighty days as if arising under and being based upon Section 5 of the statute was not consistent with but was in direct violation of the statute.

The plaintiffs in this action do not assail the validity of such present temporary lease authority which by its own terms expires October 17, 1943, which is the same date as the effectiveness of the dismissal order as to the main purchase application. There could be no new application for temporary lease authority under Section 210 (b) of the statute regardless of whether or not the main purchase application should be pending for the reason that the maximum authorized period of one hundred and eighty days has expired. Therefore, should this Court deny the application for temporary stay or interlocutory injunction, no legal rights of the plaintiffs in this action under Section 210 (b) would be impaired.

Should the plaintiffs herein, on the other hand, wish now or at any time in the future to submit to the Commission a bona
65 fide application under Section 5 of the statute for authority to enter into a genuine nontemporary lease dissociated from and having no relation to any application for approval of a purchase transaction nothing in the statute requires that such purchase application shall be pending as a condition precedent to the filing of such bona fide lease application or the granting of it now or at any time by the Commission in the future.

Wherefore, it is respectfully prayed that the Court shall endorse this intervention as having been granted, that it shall determine and adjudge that no legal rights of the plaintiffs in and concerning the matter of the lease are involved or threatened to be involved by the Commission's dismissal of the purchase application, that no grounds or ground for temporary stay or interlocutory injunction therefore exists, and that the applications for such temporary stay or interlocutory injunction be denied. It is further prayed that on final hearing this Court will determine and adjudge that the Commission's dismissal of the main purchase application because of improper parties was and is in all respects in accordance with law and that the petition to this Court be dismissed.

Respectfully submitted.

HAROLD G. HERNLY,
Harold G. Hernly,
Transportation Building, Washington, D. C.
CHARLES E. COTTERILL,
CHARLES E. COTTERILL,
70 East 45th Street, New York, N. Y.
Attorneys for Intervenors.

Intervention allowed September 20, 1943.

MORRIS A. SOPER,
U. S. Cir. Judge.
WILLIAM C. COLEMAN,
U. S. Dist. Judge.
W. CALVIN CHESNUT,
U. S. Dist. Judge.

65-A *Offer in evidence*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-F-1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSPORT CO., INC.

Application of Refiners Transport & Terminal Corporation, Detroit, Mich., for authority under Section 5, Interstate Commerce Act, as amended, to purchase the motor-vehicle rights of Marshall Transport Co., Inc., Glen Burnie, Md.

* * * * *

65-B TESTIMONY OF EDWARD S. TURNER

* * * * *

Q. Who are the directors of Refiners Transport & Terminal Corporation?

A. E. S. Turner, C. F. Lathrop, F. L. Crawford, and B. C. Graves.

Q. Will you state the occupations of Mr. Crawford?

A. Mr. Crawford is United States Congressman from the 9th District of Michigan.

Q. In so far as you know, do you know whether or not he is interested or takes any active part in the management of any other transportation company?

A. To the best of my knowledge, he doesn't.

Q. In what business was he engaged before he became a Congressman?

A. Banking and in the sugar manufacturing business.

* * * * *

65-C The WITNESS. I don't believe so.

By Mr. COTTERILL:

Q. Now, at the time of the issuance of the original capital stock of Refiners Transport & Terminal Corporation, was any of the stock issued originally to the Union Tank Car concern, or was it originally issued to some one or other persons and later purchased by Union Tank Car Company?

A. I don't know just the details of how that was handled, Mr. Cotterill.

Q. Let's skip the details and get the substance of it. I believe you received some of this stock yourself, did you not, Mr. Turner?

A. That is right. I am fairly positive the stock was issued directly to the Union Tank Car Company.

Q. Yes, and its funds went into the treasury in purchase of that stock?

A. That is right.

65-D Q. You were president at the time, I assume?

A. Yes.

Q. Then, will you not agree that the corporation was organized by the Union Tank Car Company, it was brought into existence by it, planned and conceived and accomplished by it?

Mr. WINTER. I object to that question. The record already shows that this corporation was organized by Mr. Turner and his associates out of the Overland Transportation Company and the Petroleum Transit Company by a reorganization of those corporations.

Mr. COTTERILL. Very well, sir.

By Mr. COTTERILL:

Q. At the time of that so-called reorganization, were you and your associates in any sort of trading relation with the Union Tank Car people?

A. Yes.

Q. Yes. In other words, wasn't the reorganization as characterized a step and an incident of the setting up of a corporation by the Union Tank Car people for the purpose of acquiring your business and that of several other concerns? That was the purpose, wasn't it? Nothing wrong about it, I don't say.

A. Yes, that was the arrangement.

Q. Yes.

A. Putting them all in one corporation.

Q. Yes, certainly.

* * * * *

65–E Q. Yes. Just a word about the negotiations with other companies. Will you kindly advise the Interstate Commerce Commission, as the President of Refiners Transport and Terminal Corporation, whether or not the two acquisitions covered by the present case and the one in Boston constitute the whole of your program of acquisitions in the East at any time in the reasonably near future?

Mr. WINTER. I object to that question for the same reason that he has already testified that there have been negotiations, that no negotiations have developed to a point of a contract, and it is known to everyone present that if they do develop and anything else comes up, it will be presented to the Interstate Commerce Commission at the proper time and in the proper manner. I submit that each one must stand upon itself.

* * * * *

65–F Q. Just a word about the negotiations with other companies. Will you kindly advise the Commission, as President of the Refiners Transport & Terminal Company, whether or not the two acquisitions covered by the present case and the one in Boston, constitute the whole of your program of acquisitions in the East at any time in the reasonably near future?

The WITNESS. They do not.

* * * * *

TESTIMONY OF B. C. GRAVES

* * * * *

(Discussion off the record.)

By Mr. WRIGHT:

65–Q Q. Is it or is it not a fact that there has been during the summer and spring of this year an overall shortage of

transportation facilities along the Eastern Seaboard for petroleum products?

A. I would say there was a shortage of tanker facilities, tank ship facilities, and that there was no shortage of railroad facilities as such, and there was a surplus of tank truck capacity.

I don't speak as an authority on that, but that is my opinion of the situation that exists here on the Eastern Seaboard by reason of the disturbance of the ocean-bound traffic.

Q. Can you tell us why the Union Tank Car Company decided to enter the tank-truck transportation field when they acquired the 86 percent stock interest in the applicant here?

65–H A. Well, I don't know exactly. The whole thought behind it, it looked like a growing business, and a business in which it might be profitable for us to invest our money, the same way as I think that you and I might select an investment for our own account.

Q. Your tank car business is not, is it, primarily an investment business?

A. No. We have to invest our cash.

Q. And, as I understood your direct testimony, you are taking a position as a director of the Refiners Transport and Terminal Corporation, the applicant in this case, which is contrary to an established policy of your company, is it not?

A. No, sir.

Q. I had perhaps misunderstood you. Didn't you say on direct examination that your company had a policy of discouraging its officers from holding offices in any other enterprise?

A. Unless they were interested in this other enterprise.

Q. This enterprise, the applicant here, is that the only other one in which the Union Tank Car Company is interested?

A. Yes, sir; financially.

Q. And you say the only reason for entering that field was simply to make a good investment, is that correct?

A. Oh, there may have been other reasons behind it. It was in an interesting field, but it was purely an investment. We would never have gone into it if we hadn't thought it was going to be a profitable operation to us.

65–I Q. Now since you have gone into it, has your company in any way attempted to relate the operations of the applicant here to the operation of your tank-car business?

A. Positively no.

Q. The applicant, then, performs no functions which you use as a supplementary service for your tank-car business; is that correct?

A. That is correct.

Q. And you have served as a member of the Board of Directors of the applicant ever since its organization?

A. Yes, sir.

Q. And you were consulted, were you, before the application was made here?

A. Personally?

Q. Yes.

A. No, sir. As a director, I had heard of it at a Board Meeting where the President reported his activities, but as an individual I would say no.

Q. Well, was any action taken by the Union Tank Car Company with reference to the filing of this application?

A. Not to my knowledge.

Q. The matter was not submitted by you to the Board of Directors of the Union Tank Car Company?

A. Not at all.

Q. Are the funds which are to be used to make this acquisition to be furnished by the Union Tank Car Company?

65-J A. I don't know.

Q. No decision has been made with respect to that?

A. That is correct.

Q. It is quite possible, however, is it not, that in the event the application is granted, the funds with which this purchase will be made will be supplied by Union Tank Car Company?

A. I wouldn't think that it can be as closely identified to that particular purchase, if this company increased their common and capital stock and offered it to their stockholders, the minority interests as well as ourselves. We may purchase our share of the offering, and that could be used for any purpose this corporation wishes to use it for.

Q. You would do that if the course which has been followed by you and the applicant with reference to past acquisitions is followed in this case; isn't that correct?

Mr. WINTER. I think that question is misleading with reference to past acquisitions. I don't believe that there have been any past acquisitions by this company in interstate commerce other than the reorganization of the original companies; the Overland Transportation Company, Petroleum Haulers and Petroleum Transit, as to which the record is clear.

By Mr. WRIGHT:

Q. Perhaps I am mistaken, but isn't it a fact that your original interest, the interest of Union Tank Car Company in the applicant company was substantially less than it is now?

A. Yes, that is correct.

65-K Mr. WINTER. Would you read that question, please.

(The reporter read the question.)

The WITNESS. Our percentage interest, you mean?

By Mr. WRIGHT:

Q. Yes, your percentage stock interest?

A. Yes.

Mr. WINTER. All right.

By Mr. WRIGHT:

Q. And it is also a fact, is it not, that your percentage stock interest was increased to its present level as a result of your purchase of additional shares to supply money to the applicant to acquire additional facilities?

Mr. WINTER. There is nothing in this record that so indicates.

Mr. WRIGHT. I am asking him whether it is a fact.

The WITNESS. I would say that our stock interest has increased percentagewise by reason of this corporation using that media to increase their available cash. For what purpose it was raised at the time I can't say.

By Mr. WRIGHT:

Q. Do you know what was done with the increase in cash that result?

A. I would know as a director that they probably bought new equipment, wherever it was available. I couldn't really earmark that money for any particular purpose here now. No, sir; I can't. My memory doesn't go that far.

* * * * *

65-L Examiner RALEY. Will you read the question, please.

(The reporter read the question as follows:

"At the time that Union Tank Car Company authorized the purchase, was there any discussion between Union Tank Car Company officers as to what the purpose of the purchase was?")

Examiner RALEY. That is the purchase of additional stock, Mr. Graves, I believe.

The WITNESS. I will say yes.

By Mr. WRIGHT:

Q. Was any formal action taken by Union Tank Car Company's Board with respect to the purchase?

A. That I don't recall.

Q. Is there any record of the Union Tank Car Company which would show what the purpose of the purchase was?

Mr. WINTER. I object, the same objection. This is not an inquisitory or investigational proceeding. If the Department of

Justice wants to go further, it has means of doing so. It is not proper here.

Examiner RALEY. I am not clear as to what the additional purchase of the stock that is being inquired about amounted to. What was the original amount of the stock purchased by Union Tank Car Company? Do you recall the percentage, Mr. Graves?

Mr. WINTER. I submit that that is already in the record in the decision of the Commission which has been referred to here at length.

* * * * *

65-M (The reporter read the question as follows:

"Is there any record of the Union Tank Car Company which would show what the purpose of the purchase was?")

Examiner RALEY. I will overrule the objection.

The WITNESS. I wouldn't think the Union Tank Car Company record would show the specific purpose for which this money was to be used, but I would think that the Refiners Transport & Terminal records might show it.

By Mr. WRIGHT:

Q. As an officer of the Union Tank Car Company, did you know at the time this last purchase of stock was made by the Union Tank Car Company what the proceeds of the purchase were to be used for?

A. In a general way I think I did, yes, sir; because I sat on the Board of the Refiners Transport & Terminal Company when the needs of their business were being discussed.

* * * * *

65-N By Mr. HERNLY:

Q. In the collateral application with respect to the issuance of stock for the financing of this acquisition, Mr. Graves, which is docketed as MC-F-1974, a statement appears therein that the 500,000 shares of stock proposed to be issued would be distributed pro rata among the present stockholders or shareholders, which would imply that Union Tank Car Company is going to buy 82.6 percent of this proposed stock.

There is also a statement in the same part of the application that in the event that the minority shareholders do not exercise their right to buy their prorata share, that the applicant believes that the Union Tank Car Company will buy their portion; and

65-O the assumption is that if the minority stockholders will not buy or exercise their opinion, that they will buy all of it; is that correct, sir?

A. I don't know. I didn't make that application.

Q. Is that the attitude of Union Tank Car Company, as represented by the applicant?

A. I don't know.

Q. You are an officer of Union Tank Car Company, are you not?

A. But I haven't made any such deal.

Examiner RALEY. Any further questions on cross examination?

Mr. COTTERILL. Yes, sir.

By Mr. COTTERILL:

Q. Didn't the directorate take any action, Mr. Graves, that committed itself to that?

A. Not to my knowledge as yet. I don't think it has come formally before us.

Q. Have you any thought as to the reason why the Refiners Transport & Terminal Corporation should make that representation to the Commission?

A. I don't know a thing about it. That is up to the Refiners Transport & Terminal Corporation.

Mr. WINTER. I submit Mr. Hernly's question and the subsequent discussion is as to matters which are not at issue in this proceeding. That is another proceeding.

Examiner RALEY. Mr. Winter, I think the question is pertinent, but the witness has testified he knows nothing about it.

Mr. COTTERILL. That is right.

65-P Examiner RALEY. Any further questions on cross examination?

Mr. COTTERILL. I have nothing further.

Examiner RALEY. Any questions on redirect examination?

Mr. WINTER. Just one second, please.

Examiner RALEY. Let's have a five-minute recess.

(A short recess was taken.)

Examiner RALEY. Mr. Winter, I believe you had a few questions to ask Mr. Graves.

Redirect examination by Mr. WINTER:

Q. Mr. Graves, you commented a minute ago that a statement made by Mr. Cotterill was a misstatement. I believe it bore upon *upon* the organization of Refiners Transport & Terminal Corporation. I think that Mr. Cotterill understood you to say that, probably because he didn't recall the record correctly, Union Tank Car Company organized Refiners Transport & Terminal Corporation, or some such remark. Will you give us the true facts on that that you had in mind there?

A. The true facts, as far as I remember it were that this stock was offered to us by Refiners Transport & Terminal Corporation and we offered to buy it.

Q. Will you state whether or not the Union Tank Car Company organized or became interested in Refiners Transport & Terminal Corporation as an adjunct to its tank car operations?

A. I would say that we never had anything like that in
65–Q mind, to my knowledge. Maybe somebody else did.

Q. It was——

A. We never intended to have this company operated as an adjunct to the Union Tank Car Company, or the Union Tank Car Company operated as an adjunct to it.

We retained the same management, or the same management was retained, and the management today are the same men that operated it before, and they are the minority stockholders, plus other individuals.

Q. You said a moment ago that if there was any such intent, it was not to your knowledge. Do you mean to say that if it had been the official intent of the company you would have known about it?

A. I would hope so, yes, sir.

Q. You meant by your remark that if some individual had such a secret design, it was not known to you?

A. Yes.

Q. You said it was the policy of the Union Tank Car Company that its officers and directors would not occupy positions in other corporations unless it was interested in them. You meant who had money in them, is that what you meant?

A. Financially interested; yes, sir. That may be the cause of the waiver or the reason for my being permitted to sit on this Board.

Mr. WINTER: There is nothing more that we have from
65–R this witness.

Recross examination by MR. COTTRELL:

Q. Mr. Graves, it appears, I think, that Mr. Turner before becoming an associate with you gentlemen was engaged in the petroleum haulage by tank truck, and he and his associates had varying degrees of interest in three tank truck companies, the names of which have been put into the record.

Are you advising the Commission now that the bringing together of those three tank truck companies into Refiners Transport & Terminal Corporation was an entirely independent act on the part of Mr. Turner and his own associates, having no relation to any negotiations with you gentlemen whatsoever?

A. I can't testify that that is the case.

Q. That it is or is not the case?

A. That it is or is not the case.

Q. I do not mean to challenge, in the least degree, your veracity in this comment, but you have made the apparently unqualified assertion that the Union Tank Car Company didn't bring the Refiners Transport & Terminal Corporation into existence; it was not instrumental in bringing it about. If your recollection is so clear on that, why can't you be equally clear in your recollection such a short time ago on my question?

A. My recollection was clear because—not as to the details, but as to the motive, and I thought that you indicated that we had created a child here that was to serve the Union Tank
65-S Car Company, to serve a purpose in the conduct of the Union Tank Car Company's business, and that was why I took exception to your remark.

Q. You put the emphasis on the motive rather than the modus operandi?

A. That is correct.

Q. Then, let us confine ourselves to the latter, which was the part I was really concerned with. Is it not a fact that the creation of the Refiners Transport & Terminal Corporation was the consequence of a decision made by the Union Tank Car Company that such a corporation should be created?

A. I don't think that is a proper statement of fact.

Q. How would you phrase it?

A. I would phrase it that this stock was brought into a condition where we could acquire it in a simple form——

Q. Yes.

A. By the mind of Mr. Turner and his associates and counsel, or whatever it was.

Q. Well, we will have to break that down, then, a little bit, I guess. At least, before you acquired the stock of Refiners Transport & Terminal Corporation, had there been any negotiations between officers of the Union Tank Car Company and Mr. Turner and his associates?

A. Before?

Q. Yes.

65-T A. Yes, I would say that there were conversations.

Q. And they were directed to the purpose of bringing about the ultimate ownership by Union Tank Car Company of a controlling interest in a new corporation to be created?

A. I think that is probably true.

Q. And that new corporation so to be created would embrace the three former operations of Mr. Turner and his associates?

A. I would say that is correct, not to our discussion particularly as to how to do it.

Q. You gentlemen either as a Board or armed with authority as an executive committee had concluded that in some suitable

manner you were going to become involved in the motor carrier haulage of petroleum products, hadn't you?

A. That is right.

Q. That is correct?

A. Yes.

Q. And the step which was initially taken is the matter which we have just agreed upon?

A. I think so, yes.

* * * * *

65–U Examiner RALEY. And the subsidiaries operate as a separate entity.

Mr. WINTER. The subsidiaries operate as a separate entity, but the relationship is very close because it is wholly owned.

Examiner RALEY. Of course, that is always the situation where there is a wholly owned subsidiary, but nevertheless the accounts, I think, should be segregated. I would suggest that the giving-effect balance sheet leave out the subsidiaries.

Mr. WINTER. I think I asked Mr. Turner these questions in Boston and he was unable to answer them, if I am not mistaken, so in furnishing the income statement—no, I guess the income statement has already been furnished for vendee as of August 31.

We will have to have an exhibit explaining what makes up the item "Other Income" and the item "Other Expenses."

Mr. WINTER. We will do that.

* * * * *

66 In the District Court of the United States for the District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT COMPANY, A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Before SOPER, Circuit Judge, and COLEMAN and CHESNUT, District Judges

Opinion

Filed October 16, 1943

CHESNUT, D. J.

The plaintiffs in this action seek a temporary restraining order and a temporary injunction to stay the enforcement of, and to

set aside an order entered by, the Interstate Commerce Commission on September 2, 1943, which rejected and dismissed an application of the plaintiffs for authority to consummate a sale of certain motor-vehicle common carrier operating rights and certain motor vehicles, equipment, and facilities to Refiners Transport and Terminal Corporation. The Commission dismissed the application because it was of opinion that it had no jurisdiction to entertain it since the Union Tank Car Company, a New Jersey corporation, the owner of 82.6 percent of the outstanding stock of Refiners, was not a party thereto. The bill of complaint also prayed the issuance of a mandatory injunction requiring the Commission to take jurisdiction of the application and to consider it upon its merits. This court was organized to consider the case under
67 the appropriate statutory provisions. See s. 17 (9) and s. 205 (g) of the Interstate Commerce Act, 49 U. S. C. A., ss. 17 (9), 305 (g); and the provisions for judicial review codified in 28 U. S. C. A., ss. 41, 43–48, 45 (a), and 47 (a); See also Rochester Telephone Corp. v. United States, 307 U. S. 125. The Interstate Commerce Commission and certain protesting motor-vehicle carriers have intervened.

The facts, set out at length in the report of the Commission filed April 5, 1943, are not in dispute. Marshall Transport Company, Inc., is incorporated and has its principal place of business in Maryland. The Transport Company holds a certificate of public convenience and necessity as successor in interest to Marshall under the "grandfather" clause, ss. 206, 207, Interstate Commerce Act, 49 U. S. C. A., ss. 306, 307, so that the corporation is authorized to conduct operations in interstate commerce as a motor-vehicle common carrier of petroleum products in bulk in tank trucks over irregular routes in Maryland, Delaware, Pennsylvania, Virginia, and Washington, D. C. All of Transport's outstanding capital stock except two qualifying shares is owned by plaintiff, Warren C. Marshall, who is also president of Transport. Transport has title to certain physical property consisting of shop and garage equipment, office furniture and equipment, and material and supplies. However, Marshall personally owns the automotive equipment employed by Transport, which is used by the latter under a leasing arrangement, and also certain real estate at Glen Burnie, Maryland, employed as a terminal by Transport. It was these operating rights and this property, whether owned by Transport or Marshall, which Refiners sought authority to purchase
68 in the instant application. Refiners also has pending before the Commission several other applications for the purchase of petroleum motor carriers operating in the eastern states.

Refiners Transport and Terminal Corporation is incorporated and has an office in Wilmington, Delaware, and operating offices in Detroit, Michigan. It holds a certificate of public convenience and necessity from the Interstate Commerce Commission to operate as a common carrier by motor-vehicle of petroleum and petroleum products in territory in Michigan, Ohio, Indiana, Illinois, Wisconsin, Missouri, Kentucky, Pennsylvania, and West Virginia. The organization of Refiners and of Union Tank Car Company are described in the following passage from the report of the Commission:

"REFINERS' ORGANIZATION

"Refiners is the result of a consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term. Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) in the proceedings shown in footnote 3. (These rights were acquired from its predecessor, Petroleum Transit Corporation, pursuant to authority granted in Nos. MC-FC 14544 and MC-FC 14544-A on February 24, 1941.) It controls through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 percent of its outstanding common capital stock, par value $10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 percent of such outstanding capital stock is owned by 10 stockholders, the largest block (approximately 22 percent of the total outstanding) being held by the Rockefeller Foundation, New York, N. Y. No stock is owned by a rail or water carrier and only 100 shares thereof are owned by a motor carrier. (Motor Express, Inc.) It has no stock interest in any other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment, to shippers under
69 standard car service agreements providing for rental payments on a per diem basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latters' tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. It does not manufacture tank-car equipment commercially but does maintain extensive repair facilities throughout

the country to service its own equipment. However, while in transit the railroads make minor repairs on the cars at charges provided for in a Master Car Builders Agreement to which Union is a party. Approximately 98 percent of the equipment leased is used by petroleum producers and distributors, but this is changing rapidly due to prevailing war conditions. It has seven officers, who are also its directors, only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock is usually voted under proxies held by its president and two vice presidents."

For complete details of the corporate organization and history of Refiners see the report on this corporation's application to the Commission for authority to issue additional stock found in 36 M. C. C. 789.

On July 8, 1942, an agreement of sale was executed between Transport and Marshall, as vendors, and Refiners, as purchaser, whereby Refiners purchased for the sum of $142,000 the operating rights and properties of Transport and certain equipment and terminal facilities of Marshall in Pennsylvania used by Transport in its operations. Shortly thereafter Transport took title to 10 tractors and 10 trailers with tires included in the purchase for $36,500, the remainder of the purchase price to be subject to certain adjustment and to be paid upon the approval and consummation of the sale. On July 18, 1942, Refiners purchased other equipment of Marshall for the sum of $6,000.

Application to the Commission for authority to consummate the purchase was duly made by the parties to the contract
70 and Refiners has since operated the property, first under temporary authority granted by the Commission under Sec. 210 (b) of the Act, 49 U. S. C. A., s. 310 (b), and subsequently under a temporary lease expiring October 17, 1943, executed with the authority of the Commission purporting to be based upon the provisions of s. 5 (2) (a) of the Act, 49 U. S. C. A. s. 5 (2) (a). The application came up for hearing before Division 4 of the Commission upon a favorable report of an examiner of the Commission and exceptions thereto filed by certain protesting carriers and by the Anti-Trust Division of the Department of Justice which had appeared at the examiner's hearing. Authority to consummate the purchase was granted by the Division in accordance with its report filed on April 5, 1943, one Commissioner dissenting. Subsequently the matter came up for rehearing before

the whole Commission which held in a report filed August 3, 1943, two Commissioners dissenting, that the application could not be lawfully approved because Union Tank Car Company, the owner of 82.6 percent of Refiners' outstanding stock, was not joined as an applicant therein. The Commission stated that it would dismiss the application but would defer its order for twenty days in order that Union might have an opportunity to file an application. Union did not avail itself of this opportunity and accordingly the Commission on September 2, 1943, issued its order, effective October 17, 1943, dismissing the application. The present case was instituted to set aside this order and require the Commission to consider the application on its merits.

The case turns upon the construction to be given to s. 5 (2) (a) (i) of the Act, which is as follows:

71 "s. 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)-(i), for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *"

The pertinent clauses in this section of the statute are those which make it "lawful with the approval and authorization of the Commission * * * for any carrier * * * to purchase * * * the properties * * * of another"; or "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (b) provides that whenever a transaction is proposed under s. 5 (2) (a) the carrier or person seeking authority therefor shall present an application to the Commission which shall afford a reasonable opportunity for interested parties to be heard, and if the Commission finds that the transaction is consistent with the public interest, it shall enter an order approving the transaction upon terms and conditions which it shall find to be just and reasonable.

Other references in the statute to the control of one person or corporation by another, which should be considered in determin-

ing the meaning of the word "control" in s. 5 (2) (a) are found in s. 1 (3) (b) and s. 5 (4) as follows:

"s. 1. (3) (b) For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where ref-
72 erence is made to control (in referring to a relationship between any person or persons and another person or persons, such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

"s. 5. (4) It shall be unlawful for any person, except as provided in paragraph (2) to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however, such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

The essential controversy is whether the statute is satisfied by securing the approval and authority of the Commission to consummate the sale upon the joint application of Transport and Refiners, or whether Union, as the owner of the majority of Refiners' stock, must also be joined in the application. The significance of the decision resides in the requirements of s. 5 (3) of the Act which subjects to the jurisdiction of the Commission any person, other than a carrier, who acquires control of a carrier with the approval of the Commission. Section 5 (3) is as follows:

"5. (3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control; Section 20 (1) to 10, inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section

78 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a. of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest."

It is important to appreciate the precise, and limited, point that we are called upon to decide. Division 4 of the Commission after hearing the evidence and argument by counsel for the applicants and protestants, considered both the merits of the case and the applicable law. It found the application was made by proper parties under the statute, that the transaction was reasonable and would be in the public interest and it thereupon ordered that the application be approved, subject to certain conditions not here material. Thereafter an application by the protestants the full Commission reconsidered the case, did not pass upon the merits, but dismissed the application on the ground that the majority stockholder of Refiners, the purchasing carrier, was not a party to the application. The final conclusion of the Commission was thus expressed:

"We find and conclude that the instant application may not lawfully be approved in the absence of an appropriate application by the real party in interest, the controlling corporation, Union. The application should be dismissed. Entry of an order dismissing the application will be deferred for a period of 20 days from the date of service of this report in order to afford an opportunity for Union to file an appropriate application. In view of this conclusion further discussion of other contentions now of record is unnecessary."

74 The conclusion thus reached was not based upon the nature or particularities of Union in the field of transportation or otherwise, but solely on the ground that the Union was a corporation which owned a majority of the capital stock of Refiners, the purchasing motor carrier. The rationale of the Commission's decision is equally applicable to any person or corporation, not a carrier, which owns or controls a majority of the stock of a carrier corporation. And the necessary result therefore is that the Commission lacks authority—power or jurisdiction—to grant any application by one motor carrier for the purchase of the property and operating rights of another motor carrier, unless the majority stockholder of the purchasing

carrier formally joins in the application. In reaching this conclusion the Commission departed from its long consistent prior practice to the contrary. As was said by Commissioner Porter in his dissenting opinion:

"Thus for more than seven years we have decided hundreds of applications like the instant one without the majority stockholder of purchaser being a party applicant; but suddenly the majority penalizes this particular purchaser for following the procedure which we ourselves long since established."

We think the conclusion reached by the Commission is not in accord with the intention of the statute to be gathered not only from what seems to us its plain wording, but also from its historical development.

The application in the instant case falls precisely within the permissive phrase of section 5 (2) (a) that it shall be lawful with approval and authorization of the Commission "for any carrier * * * to purchase * * * the properties, or any part thereof, of another; * * *." The construction of the
75 statute by the Commission excludes the force and effect of this express authority to the Commission on the ground that it is superseded in the instant case by a subsequent permissive authority given to the Commission "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise." That is to say, the construction of section 5 (2) (a) by the Commission takes away the authority of the Commission to even consider any application by one motor carrier for the property of another whenever the purchasing carrier has a majority stockholder, unless the latter is a party applicant.

The grammatical structure and wording of section 5 (2) (a) very clearly shows that authority was given to the Commission to consider and act upon applications made by (a) a carrier or carriers and (b) a noncarrier in different types of cases and that the Commission was given such authority to act in any one of the several enumerated situations. Thus, if an applicant or applicants are carriers the Commission is given authority to (1) permit them to consolidate or merge their properties or franchises; (2) to purchase, lease, or contract to operate the properties of another carrier; or (3) to acquire control of another carrier through stock ownership or otherwise. And if the applicant is not a carrier, it may, with the permission of the Commission, acquire control of two or more carriers through stock ownership or otherwise; and if the applicant has control of only one carrier, it may likewise acquire control of another carrier

through stock ownership or otherwise. These several situations in which the Commission is given authority to act are
76 clearly made separate and independent in the statute; but the construction adopted by the Commission has the effect of making the permitted situations in which a carrier or carriers may apply to the Commission alone, dependent upon the last enumerated situation in which a noncarrier, having stock control or otherwise [illegible] one carrier, seeks to acquire control of another. The result can only be reached on the theory that the last named permissive situation in which the Commission has authority to act eliminates or supersedes the former situation in which the Commission is expressly given the authority to act. This is not the natural construction of the wording of the section; and it is obvious that it is a construction that is not readily apparent, as the consistent practice of the Commission in similar cases for many years has been to the contrary. We think the proper meaning is that the Commission has authority to act in any one of the several permissive situations irrespective of the others. It is suggested that s. 5 (2) (a), while permissive in form is in substance made restrictive by the wording of s. 5 (4), but this view is untenable as s. 5 (4), making certain transactions unlawful, expressly excepts those authorized by s. 5 (2) (a).

The view of the Commission that the "noncarrier control clause" is restrictive of its authority to act on the "carrier purchase" clause of s. 5 (2) (a) is clearly contrary to the intention of the statute as seen in its historical development.

As is well known, the original authority of the Interstate Commerce Commission over carriers was contained in the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 380. The public policy which was at least implicit in this statute (and was expressed in the Sherman Anti-Trust Act of 1890
77 in a broader field) was that competition was desirable, and that carriers should be independently operated for the public benefit. Accordingly, although the original Act of 1887 was frequently amended in detail in subsequent years, the Commission was not itself given authority to permit consolidations, mergers or other combinations of rail carriers, until the passage of the Transportation Act of Feb. 28, 1920, c. 91, s. 407, 41 Stat. 480. (Roberts, Fed. Liability of Carriers (1929) Vol. I, ss. 92, 93.) In the meantime, however, general economic experience, emphasized by the lessons learned from the government operation of railroads during World War I, showed that there could well be in particular situations public benefit in economies and facilities of operation by mergers or combinations of rail carriers. Thus there was written into the Transportation Act of 1920, s. 5 (2), authority to the Commission to permit one carrier to acquire con-

trol of another carrier or carriers "either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system," if found to be in the public interest. And indeed by s. 5 (4), the Commission was directed as soon as practicable to prepare and adopt a plan for consolidation of the railway properties of the Continental United States into a limited number of systems. This proved a very difficult problem for the Commission and nothing has successfully been done thereunder up to the passage of The Emergency Railroad Transportation Act of June 16, 1933, c. 91, 48 Stat. 217, 220.

78 But for several years prior thereto Congress had given consideration to the subject of the public policy involved in the control of two or more carriers through the medium of a "holding company." A prototype of this latter corporate device as affecting rail carriers had years before been considered by the Supreme Court in the Northern Securities Case, 193 U. S. 197, and had been condemned as in violation of the Anti-Trust Act. The study by Congress of the effect of the holding company in this relation resulted in the re-writing of section 5 of the Interstate Commerce Act by the Emergency RR Transportation Act, and then there appeared for the first time, among the permissive clauses giving authority to the Commission to act, the categories with respect to persons or corporations not carriers acquiring control of two or more carriers through stock ownership. (See Sharfman, The I. C. C. Vol. III A, pp. 495–501 (1935).) As then phrased the permissive clause related only to control through ownership of stock. When Congress brought motor carriers under the control of the Commission (Aug. 9, 1935, c. 498, 49 Stat. 543) it gave in very similar language in s. 213 authority to the Commission to permit combinations of those carriers. Finally, by the Transportation Act of 1940 (Sept. 18, 1940, c. 722, 54 Stat. 905) water carriers were also subjected to the authority of the Commission; and the whole Interstate Commerce Act was re-written into three parts, Part I, dealing with rail carriers, Part 2, with motor carriers, and Part 3, with water carriers. Section 5 of the Act was re-written to comprehensively include all three types of carriers (and an express company) in one provision regarding unifications, merges and acquisition of control. (See 49 USCA, s. 5 (13).) At the same time there was also added in s. 5 (2) (a) the words "or otherwise" in the clause with regard to a noncarrier acquiring stock control over two or more carriers.

79 From this history of the legislation we see that there has been a gradual extension of the authority of the Commission to permit mergers and consolidations of carriers subject to its

regulation. Prior to 1920 the Commission had no such authority, and the Supreme Court had held in the Northern Securities Case that indirect unified control of two otherwise competitive rail carriers through the means of a separate holding company was prohibited by the Anti-Trust Act. To meet this condition, in part at least, and thus obtain the public benefit of unified control in particular situations, Congress provided in the Transportation Act of 1920, that the Commission should have authority to permit a rail carrier or carriers to acquire control of another by a lease, or purchase of stock or otherwise not involving actual consolidation; and by s. 5 (8) the carriers affected by the order of the Commission were to be relieved from the operation of the "antitrust laws." And by s. 5 (6) the Commission was also authorized, upon special conditions, to approve the actual consolidation of rail carriers. So far the Commission had no authority to permit the unified control of two separate carriers by the holding company device, which was still subject to the anti-trust laws. But in 1933 Congress further broadened the authority of the Commission by permitting approval of this condition when found in the public interest. It thus appears that the noncarrier control clause of the 1933 statute was intended to apply to a holding company control of two or more carriers, which is a quite different condition from the one involved in the instant application.

80 No further change was made in the phraseology of s. 5 (2) (a) until the Transportation Act of 1940 added the phrase "or otherwise" as previously noted. It appears from the Commission's opinion in this case that the chief reliance for the present construction of the Act is placed on the addition of this phrase. Indeed counsel for the United States and the Interstate Commerce Commission at the argument in this Court conceded that their position was untenable save for the change said to have been effected by the addition of this phrase "or otherwise." But we think it clear that the addition of this phrase had no such effect. It expanded and did not restrict the scope of action and authority of the Commission. That this was the intended effect is expressly stated in the only legislative history of the change which has been called to our attention. In House Conference Report, No. 2832, Aug. 7, 1940, p. 68, it was said:

"1. Paragraph (2) is changed by adding the words 'or otherwise' in several places, so that acquisition of control by methods other than true ownership of stock *is authorized with Commission approval.*" [Italics supplied.]

In the Congressional Record for the Senate on September 9, 1940, pp. 17848 to 17851, there is contained a statement by Senator Wheeler giving some explanation of certain provisions of the

Transportation Act which, in discussing the new section 5 contains no intimation that there was any intention to effect the change in the statute now read into it by the Commission. What Senator Wheeler there said was: "The principal change in existing law on consolidations is the repeal of the provision
81 requiring the Commission to prepare and adopt a general consolidation plan. Section 213 of the Motor Carrier Act, which related to unifications of motor carriers, is repealed, and the law governing all mergers or consolidations of carriers covered by the Act is amended by s. 5 of the Interstate Commerce Act."

The basic misconception of the statute found in the Commission's present construction is in treating the non-carrier control clause of s. 5 (2) (a) as restrictive or prohibitive when the history of the enactment shows clearly that it was not intended to be restrictive but permissive. In this respect the effect of the Commission's present position is to reverse the consistent progressive congressional policy in broadening the authority of the Commission to deal with various types of cases involving control of two or more carriers. This misconception seems to be due to a confusion between the permissive clause of s. 5 (2) (a) and the prohibitive clauses, of ss. 5 (4), (5), and (6). Until 1933 noncarrier control of two or more carriers was prohibited, not by the Interstate Commerce Act, but by the Anti-Trust Act. (See the discussion in Sharfman, supra, Vol. III A, p. 435 et seq.) When in 1933 Congress extended the authority of the Commission to permit noncarrier control of two or more carriers through stock ownership (that is a holding company) it also for the first time in the Interstate Commerce Act was at pains to expressly prohibit unified control of two or more carriers in any other way than those permitted in s. 5 (2) (a). The effect of these sections taken together
82 was that the Commission had authority to permit unified control by a noncarrier holding company, but not by other types of noncarrier control. The 1940 Act by adding the phrase "or otherwise" to the clause further extended the authority of the Commission in this respect.

The construction of the statute now adopted by the Commission is not necessary to the public interest in the regulation of carriers. When a noncarrier acquires control of two separate carriers (without Commission approval) there exists the possibility of disadvantage to the public interest in that one carrier may be managed in the interest of another carrier (see s. 5 (6)). To prevent this it is made unlawful for the noncarrier to acquire such control without the Commission's approval, which is to be obtained only upon an application to the Commission by the noncarrier which may then be subjected to such conditions as may be thought necessary

by the Commission in the public interest to the extent authorized by s. 5 (3). Without discussing such permissible conditions in detail it is sufficient to say that their general purpose is to preserve the integrity and efficiency of the separate carriers to the extent necessary for the public interest. Without such Commission control over the noncarrier, the Commission would have no authority to restrain its possible prejudicial activities. But when the application is made directly by one or more carriers to the Commission, the latter has full and complete authority over them by the statute to the extent of the public interests involved. In the instant case where the carrier is directly applying to the Commission to purchase the property and franchises of another motor carrier which will then cease to function as a carrier, it seems quite impossible to infer that there could be public
83 disadvantage by reason of lack of authority of the Commission to fully deal with the matter on the merits.

In dismissing the application in this case the Commission referred to Union, the majority stockholder of Refiners, as the "real party in interest." We understand this to mean no more than that the Commission felt it had no authority to consider the application by reason of its construction of the statute. But it is proper to say that in our opinion the application in this case was in fact made by the real party in interest within the statutory intent. It is a common concept of corporation law that there is a distinct difference between a corporation and its stockholders (Pullman Car Co. v. Mo. Pac. Ry. Co. 115 U. S. 587, 597; Hazeltine Corp. v. Gen. Elec. Co. 19 F. Supp. 898, 900). On the mere question of the jurisdiction of the Commission under the statute, there is no occasion in this case to go behind the direct action of the corporation itself. Our attention has not been called to any evidence in this record that the application by Refiners was anything other than due corporate action. The fact that its majority stockholder may have also approved it is immaterial. If at the hearing on the merits the Commission finds there are special reasons affecting the public interest growing out of the particular situation of Union in the field of transportation, that is a matter which the Commission can, of course, properly consider on the merits. We have no occasion to consider it here. It is not denied that on the merits the Commission has ample authority to inspect the books and records of Union so far as relevant to the case.
84 (See 49 U. S. C. A., s. 320 (d.) On the other hand the construction adopted will tend to the public disadvantage in discouraging applications for carrier consolidation which may really be in the public interest.

Some of the discussion in the opinion of the Commission seems to confuse the question of the authority of the Commission with

the merits of the particular application. Thus it is said that Union, as majority stockholder of Refiners, might furnish additional capital for the purchase of properties of other motor carriers and thus through its subsidiary (Refiners) expand indefinitely in the field of motor transportation. But the complete answer to this suggestion is that no purchase proposed directly by Refiners, even though stimulated by its majority stockholder, could be made effective without the approval of the Commission on the merits. In holding that the Commission has the authority under the statute to consider the application in the instant case, we do not intimate or imply any opinion whatever with regard to whether the Commission should approve the application on the merits. Indeed as appears from the Commission's report and the record of the case, numerous other objections on the merits have been interposed to the approval by the Commission. We have no occasion to consider them. All we hold is that on the proper construction of the statute the Commission has authority to consider the application. At the hearing here inquiry was made from the Bench as to whether counsel for the defendants interpreted the order of the Commission as amounting to a dismissal on the merits or only on the jurisdictional ground. The response of counsel for the Interstate Commerce Commission was that the latter was the only possible interpretation of the Commission's opinion and order, and so it seems to us.

85 The principal argument advanced by counsel for the defendants in support of the Commission's order is that, when Refiners buys the property of Transport, Union, as the majority stockholder of Refiners, will thus acquire control of Transport and therefore the case falls within the noncarrier control clause of 5 (2) (a). It is correctly said that if Union had itself acquired stock control of Transport, the transaction would be directly within the noncarrier control clause; and it is argued that a purchase of the property and franchises of Transport by Refiners is likewise an acquisition of control by Union. Attention is also called to the broad definition of control contained in the statute and to the legislative intention that it is to be interpreted in the light of the decision of the Supreme Court in Rochester Telephone Corp v. United States, 307 U. S. 125 (see CFce. Report, supra, p. 635).

For the reasons heretofore indicated we think this argument, so far as it is sound, goes to the merits of the particular application rather than to the authority of the Commission to consider it. We are in accord with the view that the word "control" should have the broad construction indicated, but as we find the noncarrier control clause is not restrictive of the carrier purchase

clause, and is therefore not applicable to the instant situation, it is unnecessary to the decision here to determine the full extent of the word "control." But it is not inappropriate in this connection to point out that the breadth of construction must necessarily be limited by the main purpose of the statute, which was to prevent unfair domination and management of one carrier for the advantage of another. Such a condition can exist only
86 where there are two going carriers. In the instant case if the application of the carriers is granted by the Commission there will result but one carrier, a majority of whose stock will be owned by Union. We do not think it was the intention of the statute to make the noncarrier control clause applicable to such a situation, at least with respect to the authority of the Commission to consider the application. If the particular relationship of Union in the whole situation is deemed material by the Commission, that can be fully considered by it on the merits of the case.

At the hearing of this case it was agreed that the matter should be submitted for final order or decree as well as upon the application for preliminary injunction. We conclude that the complainants are entitled to a final order to the effect that the Commission has authority to hear the application of Refiners and Transport on the merits without the formal joinder of Union in the application.

Counsel may submit the appropriate judgment in due course.

W. CALVIN CHESNUT,
United States District Judge.
WILLIAM C. COLEMAN,
United States District Judge.

87 *Dissenting opinion*

SOPER, Circuit Judge, dissenting:

It is true, as pointed out in the court's résumé of the relevant history of the statute under consideration, that Congress has recognized the economic desirability or necessity of the merger or combination of carriers in the various fields within the jurisdiction of the Interstate Commerce Commission. Through the years there has been a gradual extension of the Commission's authority to permit carrier mergers and consolidations. Equally clear, however, has been the purpose of Congress to subject these natural monopolies to regulation, and each extension of the Commission's power to permit consolidations has involved also the extension of its power and duty to secure and exercise regulatory control.

It is from this viewpoint that we must answer the question whether Union, a noncarrier which already controls through stock

ownership one motor carrier, to wit, Refiners, may secure control of another carrier, that is, Transport, by causing Refiners to purchase and operate Transport's property and privileges, and may do this without subjecting itself to the Commission's authority. It is conceded that if the transaction were to be consummated through the acquisition by Union of stock control of Transport, Union would be required by the statute to make application to the Commission. But it is said that if Union secures substantially the same extension of its influence in the carrier field through the instrumentality of Refiners, its subsidiary, Union, may lawfully remain free from the Commission's control; or, in other words, that without subjecting itself to the Commission's control Union may extend its operations in the motor-carrier field indefinitely
provided only that it does not act directly as the purchaser
88 of the property or the controlling stock interest of another carrier but secures the property or stock control thereof through the medium of its subsidiary.

This conclusion is reached very largely by centering attention upon the terms of Section 5 (2) (a) of the statute which inter alia authorize the Commission to approve, either the purchase by one carrier of the properties of another, or the acquisition by a noncarrier, which has control of a carrier, of another carrier through ownership of its stock or otherwise. Since the application of Refiners to the Commission for the approval of its purchase of Transport satisfies the first alternative, it is said that it is not necessary for Union to comply with the second alternative by joining in the application. It happens in this instance that the same transaction will accomplish both alternatives, for not only will Refiners thereby acquire the property of Transport, but Union will secure control of Transport, if a liberal rather than a strict intepretation is given to the term. It does not seem reasonable to believe that Congress intended to exempt from the Commission's control the dominant actor in such a situation; and this becomes more clear when the provisions of Section 5 (4) are given effect. Therein it is made unlawful for any person to accomplish the control in common interest of two or more carriers in any manner whatsoever except as provided in Section 5 (2). Paragraph (a) thereof requires the approval of the Commission to the transaction; and paragraph (b) thereof requires a person seeking authority to engage in such a transaction to present an application to the Commission and gives the Commission power to approve it, if it finds that it is within the scope of paragraph (a) and will be consistent with the public interest. It seems obvious, therefore, that it will be unlawful for Union to enter into the proposed transaction unless it applies for and

89 receives the Commission's approval; and it becomes the duty of the Commission to refuse to consider the proposed transaction unless Union joins in the application, for otherwise the Commission's approval will countenance the participation of Union in the formation and management of the proposed consolidation contrary to the terms of the statute..

We are told that this construction of the Statute involves the basic misconception that Section 5 (2) (a) is restrictive of the Commission's power when history shows that the section was intended to be permissive. This conclusion also is reached by centering attention upon this subsection without sufficient consideration of the other statutory provisions. The fact is that the Commission's interpretation actually augments its power and authority. If its view is adopted neither the holding company nor the subsidiary may proceed without its approval. Moreover, if, as in this case, the interested person is not a carrier, and if he is authorized to acquire control of a carrier, he must thereafter, to the extent provided by the Commission, be considered a carrier and subject to certain carrier provisions which are enumerated in Section 5 (3) of the statute. Clearly the Commission's interpretation confers upon it a control of all the persons involved which is coextensive with the merger or consolidation that is to be effected; and nothing else would effectuate the salutary purpose of Congress to permit consolidations of carriers that are economically desirable and at the same time to subject them to the authority of its appointed agent.

This interpretation of the statute depends upon the breadth to be given the term "control," as used in Section 5 (2) (a) of the Transportation Act of September 18, 1940, under which the Commission now operates. Fortunately the legislative history
90 clearly indicates the meaning which Congress had in mind. The conference report on the Transportation Act of 1940, H. R. 2832, 76th Congress, 3d sess., p. 63, contains the following passage:

"Section 2 (b). Definition of Control:

"This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of 'control' which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term 'person' is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.

"The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1 (1) (a) and section 15 (4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase 'controlling, controlled by, or under common control with' a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of Rochester Telephone Corp. v. United States (307 U. S. 125, decided April 17, 1939)."

Section 1 (3) (b) of the Act of 1940, heretofore quoted in the opinion of the court, provides that control, as used in Section 5 and other sections, shall be construed to include actual as well as legal control whether exercised through circumstances surrounding organization or operation, through common directors, officers or stockholders, voting trusts, holding companies, "or through or by any other direct or indirect means." This language was used because, as the conference report shows, language of like breadth in Section 2 of the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. A., Section 152 (b), had been recently interpreted by the Supreme Court in Rochester Corp. v. United States, 307 U. S. 125, 145, where the court said:

91 "The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

The opinion of the Supreme Court also referred to House Report 1850, 73 Congress, 2d session, 4–5, which considered the proposal to make use of the terms "parent," "subsidiary," and "affiliated" in respect to the corporate relations of common carriers

in the Communication Act of 1934. The report contained the following passage:

"Many difficulties are involved in attempting to define such terms. It is believed that a more satisfactory result will be reached by referring to such persons as in the Senate bill and the amendment. No attempt is made to define 'control' since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control. It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors."

The intent of Congress to include within the purview of Section 5 (2) (a) all means by which control of a carrier may be acquired is further shown by contrasting the terms of that section with those of the corresponding section, to wit: Section 213 (a), of the Motor Carrier Act of August 9, 1935, 49 Stat. 543, 555. In the earlier statute the acquisition of control which subjected the transaction to regulation by the Commission was such as occurs in corporate consolidation or merger, or in purchase, lease
92 or contract to operate carrier property, or in purchase of the stock of a corporate carrier. When the same subject was treated in Section 5 (2) (a) of the latter Act, Congress was careful to add the words "or otherwise" to the description of specific methods by which carrier control might be acquired. Clearly Congress desired to avoid the limitation of control to that acquired through any particular method.

If these guides to the intention of Congress are observed, it seems impossible to give to the statute the literal and narrow construction for which the plaintiffs contend; and the prior reports of Division 4 of the Commission, in which this construction was adopted without contest, lose their significance. Keeping in mind that the test is actual rather than legal control, whether exercised directly or indirectly, it is futile to point out that the pending transaction contemplates the purchase of Marshall's property and its extinction as a corporate carrier. The reality is that Refiners will acquire the property and operating rights of Marshall, and thereupon, through the instrumentality of Refiners,

Union will acquire control of another carrier. The same conclusion must be reached, if the purpose of Congress to subject motor carriers to the jurisdiction of the Commission is to be carried out, when Union, through its subsidiary, indirectly accomplishes the same result by the purchase of carrier property or by corporate merger or by other means. Under any other view, Union could expand its control over the motor carrier field indefinitely without itself submitting to the regulatory power of the Commission.

The pertinence of these observations to the peculiarities of the business of motor transport with which the Commission is familiar is shown by the following passage from its final report:

93 "There can be no more direct or positive manner of obtaining control than by outright purchase. It is inconceivable that the outright purchase of another company's franchise and properties through the medium of the already owned subsidiary would have been exempted while the mere purchase of stock control of the other company through the same subsidiary would activate the statute. As a matter of fact, acquisition of control of many motor carriers could be obtained only by purchase of the properties because many motor carriers are owned by individuals alone or by partnerships. Such individuals and partnerships often possess extensive operating rights. It further is to be noted that the financial and business structures of many motor carriers are quite simple even when incorporated. Their stock usually is closely held, and they rarely have securities outstanding, evidencing long-term debt. Their terminals in many instances are rented; their equipment if not fully paid for is covered by some form of a purchase money contract; their other assets often consist of a relatively small amount of furniture, some spare tires and parts, together with accounts 'receivable' representing outstanding freight bills, etc. Their 'liabilities' often consist principally of unpaid equipment balances, bills for tires, parts, and fuel, etc. It often is quite simple under these circumstances to acquire for cash the 'assets' including certificate and goodwill, and to assume or pay the 'liabilities,' and to liquidate the concern. Proceeding thus through a controlled subsidiary, a noncarrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of 'control' as used in the Act."

The decision of the Commission should be sustained, and the bill of complaint should be dismissed.

94 In the United States District Court for the District of Maryland

[Title omitted.]

Findings of Fact and Conclusions of Law

Filed Nov. 1, 1943

Upon final hearing in this suit the following findings of fact and conclusions of law are made:

FINDINGS OF FACT

1. The Interstate Commerce Commission on September 2, 1943, entered an order of dismissal effective October 17, 1943, dismissing an application filed by plaintiffs in a proceeding pending before the Interstate Commerce Commission designated Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co., Inc., and Warren C. Marshall, bearing its docket No. MC-F-1936.

2. Said proceedings before the Interstate Commerce Commission arose upon an application filed by plaintiffs asking for authority for Marshall Transport Co., Inc., a motor common carrier subject to Part II of the Interstate Commerce Act, to sell certain interstate operating rights and for Warren C. Marshall to sell certain carrier properties to Refiners Transport & Terminal Corporation, also a motor common carrier subject to Part II of the Interstate Commerce Act, pursuant to a contract made between the parties dated July 8, 1942. Such authority was requested under Section 5 (2) (a) of the Interstate Commerce Act. There is no dispute about the facts, and they are fully set forth in the
95 report of Division 4 of the Interstate Commerce Commission as such findings were adopted by the full Commission.

3. The Interstate Commerce Commission found and concluded that said application could not duly be approved because it was filed by Refiners Transport & Terminal Corporation without joinder therein of the owner of 82.6% of the total issued and outstanding capital stock of Refiners Transport & Terminal Corporation, such stock interest being owned by Union Tank Car Company, a New Jersey corporation.

CONCLUSIONS OF LAW

1. The transaction proposed falls precisely within the permissive phrase of Section 5 (2) of the Interstate Commerce Act:

"(a) It shall be lawful, with the approval and authorization of the commission, as provided in subdivision (b) * * * (i)

for any carrier to purchase * * * the properties * * * of another * * *.

"(b) Whenever a transaction is proposed under subparagraph (a), * * * the carriers * * * seeking authority therefor shall present an application to the commission * * *."

2. The carriers seeking authority therefor presented an application to the Commission and said application should not have been dismissed.

3. Said proceeding arose under Part II of the Interstate Commerce Act, and the Commission issued a negative order solely because of a supposed lack of power, and the Complaint in this suit was filed by parties of interest under the Urgent Deficiency Appropriation Act of October 22, 1913, and this Court does hereby determine that the Interstate Commerce Commission has authority and power and jurisdiction to hear the application of Refiners Transport & Terminal Corporation on the merits without the joinder of Union Tank Car Company in the application.

4. It is hereby directed that a judgment shall be entered enjoining, setting aside and annulling the dismissal order of
96 the Interstate Commerce Commission entered in said proceedings and enforcing by writ of mandatory injunction the Commission's taking jurisdiction of said application as filed with said Commission and proceeding to final disposition thereof in accordance with these findings and conclusions.

Dated: November 1 1943.

WILLIAM C. COLEMAN,
William C. Coleman,
District Judge.

W. CALVIN CHESNUT,
W. Calvin Chesnut,
District Judge.

MORRIS A. SOPER, Circuit Judge, dissenting.

97 In the United States District Court for the District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT CO., INC., A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT & TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS *vs.* UNITED STATES OF AMERICA, DEFENDANT

Judgment

Filed November 1, 1943

This suit came on for hearing before Honorable Morris A. Soper, Circuit Judge; Honorable William C. Coleman, District

Judge; and Honorable W. Calvin Chesnut, District Judge, in accordance with the statutes in such case made and provided, and thereupon, upon consideration of the pleadings, the oral arguments and brief of plaintiffs, defendant, and intervenors, and a certified copy of the record of the Interstate Commerce Commission in the matter of the application of Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co., Inc., and Warren C. Marshall, bearing its docket No. MC–F–1936, the Court having made finding of fact specially and conclusion of law, and at the hearing it having been agreed that the matter should be submitted for final order or decree, as well as upon the application for preliminary injunction, plaintiffs' motion for an interlocutory injunction is granted and as a final order, decree, and judgment.

It is ordered that the order of dismissal of the Interstate Commerce Commission entered in the above-mentioned proceedings is hereby enjoined, set aside, and annulled, and this Court does hereby enforce by writ of mandatory injunction the Com-
98 mission's taking of jurisdiction of the application as filed with said Commission without Union Tank Car Company's becoming a party applicant, and proceeding to final disposition thereof in accordance herewith. The clerk is hereby directed to enter this judgment.

Dated: November 1, 1943.

WILLIAM C. COLEMAN,
William C. Coleman,
District Judge.
W. CALVIN CHESNUT,
W. Calvin Chesnut,
District Judge.

MORRIS A. SOPER, Circuit Judge, Dissenting.

99 In the District Court of the United States for the District of Maryland

[Title omitted.]

Petition for appeal

Filed Dec. 17, 1943

The United States of America, defendant, the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, Intervenors, in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the District of Maryland, entered November 1, 1943,

pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendant and intervenors consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said defendant and intervenors pray that a transcript of the record, proceedings, and papers upon which said decree was
100 made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated December 17, 1943.

WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United State Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.
DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.
CHARLES E. COTTERILL,
HAROLD G. HORNLY,
For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

101 In the District Court of the United States for the District of Maryland

[Title omitted.]

Assignment of errors

Filed Dec. 17, 1943

Come now the United States, defendant, the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, intervenors, in the above-entitled cause, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to the Supreme Court of the

United States herewith petitioned for in said cause from the decree of the District Court of the United States for the District of Maryland, entered November 1, 1943:

102 The Court erred in holding that the conclusion reached by the Commission as to its authority and jurisdiction under section 5 (2) (a) of the Interstate Commerce Act is not in accord with the intention of the statute to be gathered from its plain wording and from its historical development.

The Court erred in holding that the "noncarrier control clause" of section 5 (2) (a) is not restrictive of the Commission's authority to act on the "carrier purchase clause."

The Court erred in holding that the application in this case was in fact made by the real party in interest within the statutory interest.

The Court erred in holding that the Commission has authority to hear the application of Refiners and Transport on the merits without the formal joinder of Union in the application.

The Court erred in directing that a judgment shall be entered, enjoining, setting aside and annulling the dismissal order of the Commission of September 2, 1943, and enforcing by writ of mandatory injunction the Commission's jurisdiction of said application as filed with the Commission and proceeding to final disposition thereof on the merits.

The Court erred in entering the final decree of November 1, 1943.

The Court erred in failing to find that the complaint was without equity.

The Court erred in failing to dismiss said complaint.

Dated December 17, 1943.

103 WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United States Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.
DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.
CHARLES E. COTTERILL,
HAROLD G. HERNLY,
For Costal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

104 In the District Court of the United States for District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT COMPANY, A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

and

THE INTERSTATE COMMERCE COMMISSION, COASTAL TANK LINES, INC., LEAMAN TRANSPORTATION COMPANY, PETROLEUM TRANSPORT COMPANY, SHIPLEY TRANSFER COMPANY, VEDDER TRANSPORTATION COMPANY, M. I. O'BOYLE & SON, CLARE M. MARSHALL, WILLIAM F. CROSSETT, AND RICHARD F. KLINE, INTERVENORS

Order allowing appeal

Filed Dec. 17, 1943

In the above-entitled cause, defendant and defenant intervenors having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered November 1, 1943, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided, it is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

And it is further ordered that petitioners other than the United States and the Interstate Commerce Commission, give bond
105 in the sum of $250.00 as a cost bond.

Dated December 17, 1943.

WILLIAM C. COLEMAN,
United States District Court Judge.

106 [Citation in usual form showing service on Robert W. Williams, omitted in printing.]

115 In the District Court of the United States for the District of Maryland

[Title omitted.]

Notice of appeal

Filed Dec. 20, 1943

To the Attorney General for the State of Maryland:

You are hereby notified that the District Court of the United States for the District of Maryland, on December 17, 1943, filed and

entered an order allowing an appeal by the United States, the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline to the Supreme Court of the United States
116 from a decree filed and entered on the 1st day of November 1943, in the above-entitled cause, and that the citation signed by such court on December —, 1943, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, defendants' jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United State, and the statement required to be served on the appellees by said Rule 12.

This notice is given to you pursuant to the provisions of U. S. Code, Title 28, sec. 47a, Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220.

Dated December 17, 1943.

WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United States Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.
DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.
CHARLES E. COTTERILL,
HAROLD G. HERNLY,
For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

117 CERTIFICATE OF SERVICE

This is to certify that the above notice of appeal was served upon the Attorney General for the State of Maryland on December

18, 1943, by depositing the same together with attachments in the United States Mail in franked envelopes addressed to him at Annapolis, Maryland.

DANIEL H. KUNKEL,
For Interstate Commerce Commission.

121 In the District Court of the United States
For the District of Maryland

[Title omitted.]

Motion for order directing clerk to transmit original exhibits in lieu of copies

Filed Dec. 27, 1943.

And now comes the United States, defendant, and the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, intervenors, and move the Court for an order directing the Clerk of Court to transmit to the United States Supreme Court the record before the Interstate Commerce Commission in Docket No. MC–F–1936, as introduced in evidence in the trial of this cause, in lieu of a copy thereof.

Dated December 21, 1943.

122 WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United States Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.
DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.
CHARLES E. COTTERILL,
HAROLD G. HERNLY,
For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

December 22, 1943, Marshall Transport Co., Inc., Warren C. Marshall, and Refiners Transport and Terminal Corporation, plaintiffs-appellees, consent to the entry of the order in the form attached.

ROBERT W. WILLIAMS.

123 *Order of court*

Upon consideration of the within motion and it appearing that plaintiffs-appellees consent to the entry of the order sought by said motion,

It is ordered, that the Clerk of Court transmit to the United States Supreme Court, as part of the record on appeal, the record before the Interstate Commerce Commission in Docket No. MC-F-1936, as introduced in the trial of this cause, in lieu of a copy thereof.

By the Court.

WILLIAM C. COLEMAN,
United States District Court Judge.

Dated December 27th, 1943.

124 In the District Court of the United States for the District of Maryland

[Title omitted.]

Appellants' praecipe for transcript of record

Filed Dec. 27, 1943

To the clerk of the above-named court:

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript of record the following, to wit:

(1) The complaint.
(2) Motion for Interlocutory Injunction.
(3) Notice of Hearing on Motion for Interlocutory Injunction.
(4) Answer of the United States.
(5) Intervention and answer of Interstate Commerce Commission.
(6) Petition of Coastal Tank Lines, Inc., et. al., for leave to intervene and order of allowance.

125 (7) Record before Interstate Commerce Commission in Docket No. MC-F-1936 (Original to be transmitted in lieu of copy pursuant to order of court), as introduced in evidence at the trial of the above-entitled cause.

(8) The majority opinion filed October 16, 1943.

(9) The dissenting opinion of U. S. Circuit Judge Soper.
(10) Findings of fact and conclusions of law entered by the District Court entered November 1, 1943.
(11) Final decree entered November 1, 1943.
(12) Petition for appeal.
(13) Assignment of errors.
(14) Jurisdictional statement.
(15) Order allowing appeal.
(16) Citation on appeal.
(17) Statement directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court.
(18) Notice to the Attorney General of the State of Maryland.
(19) Motion and order of court for transmitting of original record before the Commission as introduced at the trial of the cause, in lieu of copy.
(20) This praecipe.

WENDELL BERGE,
Assistant Attorney General.
BERNARD J. FLYNN,
United States Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.
DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.
CHARLES E. COTTERILL,
HAROLD G. HERNLY,
For Coastal Tank Lines, Inc., Lewman Transportation Company, Petroleum Transport Company, Shipley Transfer Co., Vedder Transportation Co., M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, Richard F. Kline.

126 AFFIDAVIT OF SERVICE

Daniel H. Kunkel upon his oath deposes and says that he is one of the attorneys of record for the Interstate Commerce Commission, one of the Intervenor-appellants herein, that he has served copies of the foregoing praecipe for transcript of record upon the plaintiffs (appellees) by depositing the same in the United States mail in Washington, D. C., on December 18, 1943, in sealed, franked envelopes, properly addressed to their attorneys of record, as follows: John T. Money, Esq., 801 Mills Building, Washington, D. C.; Robert W. Williams, Esq., c/o Ritchie, Jan-

ney, Ober and Williams, Baltimore Trust Building, Baltimore, Md.; Robert C. Winter, Esq., 2850 Penobscot Building, Detroit, Mich.

DANIEL H. KUNKEL.

Sworn to and subscribed before me this 18th day of December 1943.

[NOTARIAL SEAL] EUGENIA W. SUTER,
Notary Public.

127 In District Court of the United States for the District of Maryland

[Title omitted.]

Stipulation by appellees as to portions of record to be incorporated into the transcript thereof

Filed Dec. 30, 1943

To the Clerk of the above-named Court:

Please be advised that the undersigned appellees desire no additional portions of the record to be incorporated into the transcript to be filed in the Supreme Court of the United States, other than those parts of the record designated in "Appellants' Praecipe for Transcript of Record".

REFINERS TRANSPORT & TERMINAL CORPORATION,
By ROBERT C. WINTER,
One of its Attorneys,
2850 Penobscot Building, Detroit 26, Michigan.

Dated December 23, 1943.

128 [Clerk's certificate to foregoing transcript omitted in printing.]

129 In the Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed Jan. 12, 1944

Now come the appellants and say that they will rely in brief and oral argument before this Court on the points made in their assignment of errors on their appeal in the above-entited cause. Appellants further state that the entire record in this cause, as filed in this Court pursuant to praecipe for transcript of the record,

is necessary for consideration of the points specified above, with the exception of Items 2 and 3 of said transcript of record.

CHARLES FAHY,
Solicitor General,
WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United States Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.

130

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
DANIEL H. KUNKEL,
Daniel H. Kunkel,
Attorney,
For Interstate Commerce Commission.
CHARLES E. COTTERILL,
Charles E. Cotterill,
HAROLD G. HERNLY,
For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

CITY OF WASHINGTON,
District of Columbia, ss:

Daniel H. Kunkel, being duly sworn according to law deposes and says that he is one of the attorneys of record for the Interstate Commerce Commission, one of the appellants herein and that he served copies of the above statement upon all of appellees by depositing same, properly addressed to their attorneys of record, in the United States mails at Washington, D. C., on the 11th day of January 1944, in sealed, franked envelopes, said attorneys being: Robert C. Winter, Esq., 2850 Penobscott Bldg., Detroit, Mich.; Robert W. Williams, Esq., Baltimore Trust Bldg., Baltimore, Md., John T. Money, Esq., 801 Mills Bldg., Washington, D. C.

DANIEL H. KUNKEL.
Daniel H. Kunkel.

Sworn and subscribed before me, a Notary Public, this 11th day of January, 1944.

[Seal]

EUGENIA W. SUTER.

[File endorsement omitted.]

131 In the Supreme Court of the United States

Stipulation re printing of record

Filed Jan. 31, 1944

It is hereby stipulated by and between counsel for the appellents and counsel for the appellees in the above entitle cause that only pages, 111, 122, 123. 138, 144, 224, 225, 226, 227, 228, 230, 233, 236, 237, 238, 239, 240, 241, 242, and 275 of Item 7 of the praecipe for transcript of record shall be printed and that no other part of Item 7 shall be printed as a part of the record in the above entitled cause, but that all of Item 7 shall be retained as part of said record and may be referred to by the Court and by counsel for the parties in their briefs and arguments in this cause.

Dated January 18, 1944.

Charles Fahy, Solicitor General, Wendell Berge, Attorney General, Bernard J. Flynn, United States Attorney, Robert L. Pierce, Special Assistant to the Attorney General, For the United States; Daniel W. Knowlton, Chief Counsel, Daniel H. Kunkel, Attorney, For Interstate Commerce Commission; Charles E. Cotterill, Harold G. Hernly, For Costal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, John T. Money, For Marshall Transport Co., Inc., and Warren C. Marshall; Robert W. Williams, George H. Klein, Bigham D. Eblen, Robert C. Winter, Harry S. Elkins, for Refiners Transport & Terminal Corporation.

132 Supreme Court of the United States

Order noting probable jurisdiction

January 31, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] File No. 48082. Maryland, D. C. U. S. Term No. 589. The United States of America, Interstate Commerce Commission, Coastal Tank Lines, Inc., et al., Appellants vs. Marshall Transport Company, Warren C. Marshall, Refiners Transport Terminal Corporation. Filed January 10, 1944. Term No. 589 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1944